Safeguarding Public Funds: A Review of Spending Practices in OMRDD Rate Appeals

Clarence J. Sundram
CHAIRMAN

Elizabeth W. Stack
William P. Benjamin
COMMISSIONERS

January 1995

NYS COMMISSION ON QUALITY OF CARE
FOR THE MENTALLY DISABLED

Executive Summary

The Mental Hygiene Law authorizes the Commission on Quality of Care for the Mentally Disabled to "review the cost effect of mental hygiene programs and procedures provided for by law with particular attention to efficiency, effectiveness and economy in the management, supervision and delivery of such programs. Such review may include...determining reasons for rising costs and possible means of controlling them..." (Section 45.07, subd. (b)).

In Chapter 50 of the Laws of 1993, the State Legislature further directed the Commission to investigate "suspected misuses of public funds by programs or facilities licensed by an office of the department of mental hygiene."

During the course of such an investigation into Community Living Alternative, Inc. (CLA) which operated a 10-bed intermediate care facility for the mentally retarded (ICF), the Commission discovered that this agency had been the beneficiary of a successful rate appeal to the Office of Mental Retardation and Developmental Disabilities (OMRDD) for additional Medicaid funds to hire more staff. Not only did CLA receive the rate increase it sought, but it was also granted a *retroactive* payment of $138,798 for the cost of additional staff which, it turned out, *the agency had never hired.* Most of this windfall payment of Medicaid funds was soon dissipated through cash payments (see *Missing Accountability: The Case of Community Living Alternative, Inc.*, June 1994[1]). The Commission undertook this study of the management of the rate appeals process by OMRDD to ascertain whether the flaws which surfaced in the CLA investigation were isolated aberrations or symptoms of more systemic problems in safeguarding public funds.

Significance of Rate Appeals

Rate appeals play a significant role in the financing of OMRDD programs not only because of the number of provider agencies that receive additional funding through appeals, but also because rate appeals, once granted, have a long-term effect upon expenditures. As the example in Chart IV (page 9) of the report illustrates in a hypothetical situation, $100,000 in rate appeals funding granted in 1988 will account for recurring expenditures in each succeeding year as well

1 Since the conclusion of that investigation, OMRDD secured a receivership of the program and arranged for an orderly transfer of its operations to another provider. The Commission has referred evidence of suspected criminal conduct by the former operator to appropriate law enforcement agencies and is assisting them in an active criminal investigation.

as cost of living "trend factors" which together, over the next five years, will require the expenditure of $597,900. The Commission found:

- over 30% of OMRDD providers which operate ICFs and community residences (CRs) have their rates increased each year as a result of rate appeals;
- 53% of all ICF rates are affected by a prior rate appeal award which is "rolled over" into the current rate;
- 84% of the appeal files[2] for ICFs and CRs closed in 1988, 1990 and 1991 were granted in whole or in part; and,
- rate appeals account for the expenditure of significant sums of public money ($22 million in 1991 or an increase of 40% over the previous year) and, as indicated earlier, have a recurring annual impact on State finances.

Methodology

In conducting this study, Commission staff interviewed relevant OMRDD staff involved in the processing and review of rate appeals; examined extensive documentary evidence of the rate appeal procedures and processes; and performed an in-depth analysis of a sample of rate appeal files to determine how the appeals process had been applied in specific cases.

Throughout the course of this review, Commission staff received full cooperation from OMRDD officials who provided complete access to requested records and were generous with their time in providing any explanations needed to fully understand OMRDD policies and procedures or issues which arose in specific cases.

2 An appeal file typically contains multiple appeals for several sites and/or cost categories for an individual provider. However, since the surplus/loss analysis described in the body of the report (pp. 3-5) is conducted on an agency-wide basis, all appeals are processed simultaneously in a single file.

Findings

The Commission found that the rate appeal system is susceptible to abuse.

- OMRDD had inadequate formal written procedures for processing appeals and in some cases proper reviews were not conducted before appeals were granted (Report pp. 8, 13).
- As in the case of CLA, agencies received appeal funds in the amount of $1.4 million for the years 1986-90 which were not spent on the purposes for which they were claimed, or were not spent at all (Report pp. 8-10).
- Nevertheless, on the advice of its Counsel, OMRDD did not recoup such funds but annualized these appeal awards by "rolling over" such sums into future years, permitting agencies to spend these funds at their discretion (Report pp. 8-10).
- These practices permitted the expenditure of millions of dollars of public funds on purposes unrelated to the reason for the initial appeal (Report pp. 8-10).
- In some cases, OMRDD negotiated settlements of large appeals with providers without holding them to the purpose of the appeal. In 1991, such settlements totaled $3.7 million for three providers. Providers were treated inconsistently in these settlements, with some being exempted from future audits and others being explicitly warned of a future audit (Report pp. 10-11).
- In two cases, appeal funds totaling almost $2 million were granted or offered to rescue agencies which had long histories of fiscal mismanagement and substandard care, without prior audit to determine the reasons why additional funds were needed and without assurance that the defective practices had been corrected (Report pp. 11-12).

The Commission found that many of these weaknesses in the OMRDD rate appeal process were facilitated by the lack of sound internal controls and procedures for handling rate appeals. Thus, the Commission found that:

- inconsistent approaches by staff to handling rate appeals were not detected or corrected by supervisors, despite multiple levels of review within OMRDD before appeals are forwarded to the State Division of the Budget (DOB) for approval (Report p. 13);

- voluminous past appeal records are filed haphazardly resulting in improper appeal awards (Report pp. 13, 15);
- providers receiving appeal awards had their deficits overstated by an estimated $1.4 million annually due to double counting of property costs in the appeal analysis, potentially subjecting this amount to double reimbursement (Report p. 13);
- despite a policy against exceeding the limits for administrative costs, the appeal methodology permits *indirectly* granting funds for excessive administrative costs, including large salary increases to some providers (Report pp. 13-14);
- despite a DOB decision in 1992 to reduce administrative costs by two percent, OMRDD exempted all providers with rollover appeals built into their administration rates (Report pp. 14-15);
- revenue from occupancy levels which exceeded levels anticipated in rate making was ignored, permitting excess revenue to be received by providers. The Commission estimated that ICF providers receiving appeal awards had their deficits overstated by a total of $474,000 annually as a result (Report pp. 15-16);
- errors in the vacancy calculations permitted providers to retain funds for variable costs (e.g., food, consumable supplies, etc.) that are not incurred when beds were vacant (Report p. 16). This error affected $1.5 million in vacancy appeal awards in 1991; and,
- virtually all of the flaws and errors identified in the course of this study resulted in the payment of additional and unwarranted sums of money to the provider agencies rather than in denying payments.

Conclusion

The findings of the Commission's review of the OMRDD rate appeals process indicate that the flaws uncovered in the CLA investigation were symptomatic of more systemic weaknesses that affect the payment of significant sums of public funds to OMRDD providers.

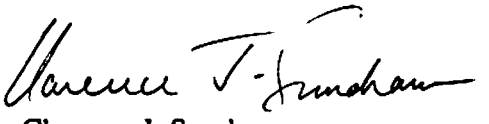
The Commission is concerned that irregularities in the process of reviewing and granting rate appeals, the lack of accountability for how appeal funds are actually spent, and the legal interpretations of OMRDD regulations that essentially place provider decisions to spend public funds on purposes unrelated to the appeal beyond scrutiny have combined to place a low priority on ensuring the fundamental legal objective of "efficient and economical" rates.

The recommendations contained in this report are designed to strengthen accountability for the expenditure of public funds, and to reduce unnecessary and unwarranted expenditures.

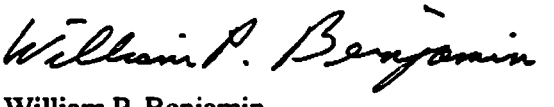
A draft report was issued to OMRDD in December 1993. A response to this draft from the Commissioner of OMRDD is attached to this report (Appendix A). Since that time, there have been extensive discussions between CQC and OMRDD staffs. OMRDD reports that it has made major modifications in the way it handles appeals, including the development of a rate appeal procedures manual. For example, by addressing the Commission's recommendations on duplicative reimbursement for provider equipment and high occupancy levels, and on the funding of vacant beds, OMRDD reports that it has eliminated some $2 million in reimbursement costs. The Commission believes that further economies can be made by revising the appeal methodology that has allowed the indirect funding of excessive administration costs. This final report contains other recommendations by the Commission to improve accountability for the expenditure of public funds, including:

- recovering unspent or misspent appeal funds in both the initial and in "rollover" years; and,
- auditing settlement awards to assure that funds are spent on the purposes for which they are granted.

This report represents the unanimous opinion of the members of the Commission.



Clarence J. Sundram
Chairman



William P. Benjamin
Commissioner

Elizabeth W. Stack
Commissioner

Table of Contents

Staff Acknowledgments

Fiscal Staff

Walter E. Saurack, M.S., Director

Richard M. Cicero, C.M.A., C.P.A., M.S.

Robert F. Myers, C.P.A.

Elizabeth A. McKernan

Michael V. McCarry, M.P.A.

James X. Tunney, C.I.A., C.P.A., M.B.A., M.S.

Publications Staff

Marcus A. Gigliotti

Carole A. Greene

The OMRDD Reimbursement System

Rate Setting

To understand the intricacies of the appeal process, it is useful to first understand how providers are reimbursed through OMRDD's rate system. Under federal statute, 42 U.S.C. §1396a (a)(13)(A), states are required to ensure that medical assistance payments (i.e., Medicaid) for ICF services are "reasonable and adequate to meet costs which must be incurred by efficiently and economically operated facilities" which comply with federal and State laws, regulations and standards. In so doing, states are given wide latitude to develop methods, standards and criteria to compensate providers for reasonable and necessary services. Consequently, there is no requirement that payment rates reimburse a provider for every cost.[3]

To meet this federal standard, OMRDD has developed a "prospective" rate methodology; i.e., rates are established and fixed in advance based on cost data of a selected prior year. Per diem rates are established for every ICF and CR site by determining a program's total allowable actual costs for a "base year" (currently 1986/87) and then dividing it by the number of client days of care expected.[4]

$$\text{Per Diem Rate} = \frac{\text{Base Year Allowable Costs}^{5}}{\text{Expected Number of Client Days}^{6}}$$

Initially, the rate setting methodology was designed to update the base year every two years. The rationale to do so was to reimburse only the necessary costs of maintaining acceptable care and to moderate increases in those costs due to efficiencies in the programs. Should actual costs in a rate year fall below the rate, an "efficient" provider would accumulate a surplus of funds it could keep. Thus,

3 In 1980, by enacting the "Boren Amendment" to the Medicaid statute, Congress intended states to abandon Medicaid reimbursement schemes that paid providers actual costs despite obvious disparities in efficiencies and economies, in favor of giving states the flexibility to develop reimbursement methods that encouraged efficiency and cost containment (Pub.L. 96-499, §962(a), amending 42 U.S.C. §1396a (a)(13)(A)).

4 Pursuant to the OMRDD Commissioner's general authority to set rates/fees (NY Mental Hygiene Law, § 41.36), the ICF reimbursement approach has been used for community residences as well. However, effective March 1, 1993, a new rate system for CRs was adopted. Under this system CR rates are no longer appealable, although appeals under the prior method would be considered if they were filed by February 28, 1994.

5 Base year allowable costs are the actual costs recorded on the provider's 1986/87 cost report subject to "screen" limits which generally allowed costs at five percent above the group median for each spending category.

6 Expected number of client days is an estimate of each provider's occupancy level. Estimates of occupancy levels range from 99 to 100 percent of full capacity.

to encourage efficiency, there would be a financial incentive for providers to incur costs below the prospective rate which in turn would moderate future rate increases. However, surpluses would be temporary since the rate system was designed to re-establish new rates every two years taking into account actual costs of efficiently delivered services.[7]

In order to further meet the federal requirement to establish a procedurally sound rate methodology considering relevent factors of efficiency and economy, OMRDD additionally established ceilings or "screens" on operating costs. Applying screens would help to contain costs by limiting a provider's reimbursement rates to the median cost performance of other providers. Costs that exceeded the screen amount would be considered uneconomical and therefore not allowed in the per diem rate.

Screens have been developed for each of the following cost categories:

- Administration
- Direct Care/Support Personal Services
- Clinical Personal Services
- Other Than Personal Services (OTPS)
- Fringe Benefits

Generally, screens take into consideration cost fluctuations resulting from differences in geographic region, facility size, client disability levels, and the staffing pattern utilized. Screens also were developed so that over one-half of all providers fell below the cost limits and therefore received full reimbursement;[8] providers exceeding the screens did not have their excess costs reimbursed because such spending was not considered to be efficient and economical.

However, OMRDD's rate system has not achieved its full potential to contain costs. The Commission has found that the 1986/87 base year for calculating rates is not being updated but instead is being "trended" forward for future years using an inflation factor in order to maintain the base year pattern of expenditure.[9] Additionally, sites opened after the 1986/87 base year have had their rates based on "budgeted" costs instead of actual base year costs. Because of the significant expansion of the ICF program in recent years, **about 40 percent of all ICF rates**

7 This feature of the rate methodology has a major drawback. When providers know in advance the new base year for calculating rates, an undesirable incentive is created to "load up" costs in the base year to enhance future rates.

8 Screens were statistically calculated to allow full reimbursement of costs for more than one-half of the providers typically by taking the median costs and adding five percent.

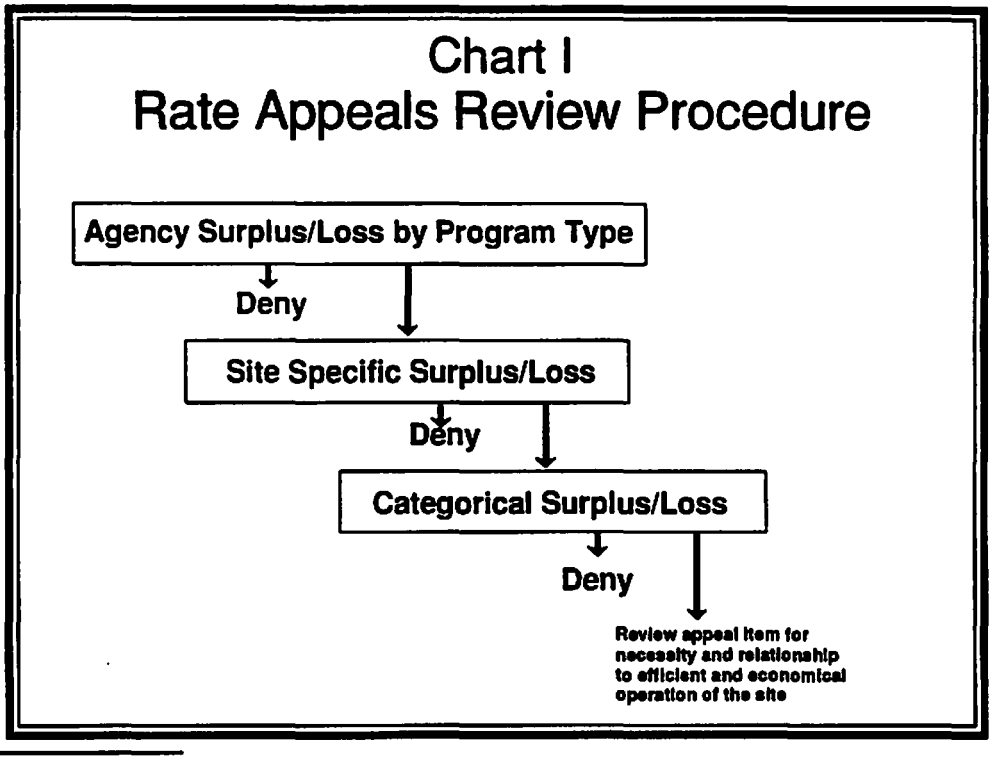
9 There is one cost component, property, which continues to be updated annually based on reported costs of two years prior.

have been based on budgeted costs. Although efficiency should not be measured in terms of costs alone,[10] periodic looks at patterns of expenditure and quality of care would help OMRDD determine if it is a prudent buyer of services. As the case of CLA referred to earlier demonstrates, it is not a routine practice of OMRDD to examine such expenditure patterns. Thus, there is little assurance that rates reflect only monies properly spent on quality services rather than on excessive or impermissible expenditures.

Rate Appeals

OMRDD's regulations allow providers under specific circumstances to request appeals for adjustments to their established rates (14 NYCRR 681.12(d); 14 NYCRR 686.13(j)). OMRDD may consider an appeal to the rates to provide additional funding for:

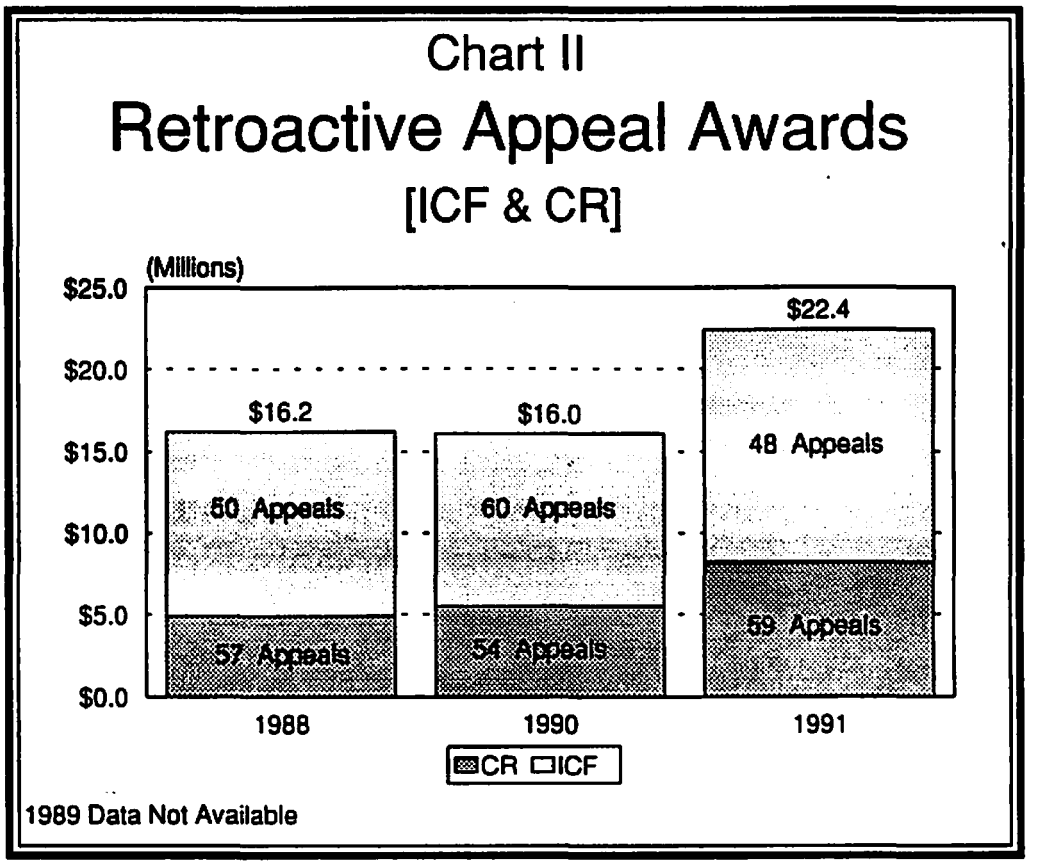
- increases in a facility's base year operating costs due to implementation of new programs or mandates;
- changes in staff or service;



10 In adopting rates, OMRDD is also required to consider costs necessary to assure quality care and to establish rates that allow reasonable access to services for Medicaid recipients.

- changes in numbers or characteristics of clients;
- price increases not anticipated; or,
- "relief" from screens.

Providers generally have one year from the close of the rate year in question to file a rate appeal application and demonstrate that the rate requested in the appeal



is necessary to ensure an efficient and economical operation.[11] (Appeals for relief from screens must be submitted within 90 days.) Once the OMRDD appeals unit receives the application, it performs a surplus/loss analysis. The purpose of this

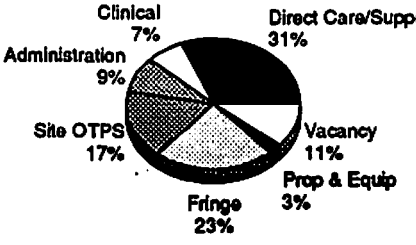
11 According to the State plan filed with the U.S. Department of Health and Human Services pursuant to Title XIX of the Social Security Law, "The burden of proof on appeal shall be on the provider to present clear and convincing evidence to demonstrate that the rate requested in the appeal is necessary to ensure efficient and economical operation."

Chart III

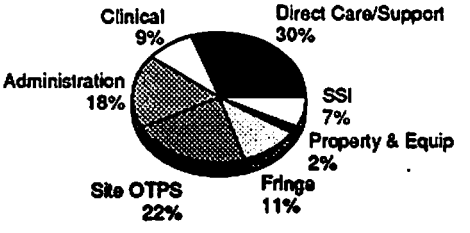
Retroactive Appeal Awards

1991

ICF Total $14.2M



CR Total $8.2M



Total Dollars $22.4M

analysis is to determine whether existing funding levels are sufficient to cover expenditure levels. OMRDD will only consider appeals if there is a shortfall of revenues within the program, site and cost category being appealed (see Chart I). In considering appeals,[12] it is expected that providers apply surpluses at one site or category to losses in another given site or category. When performing the surplus/loss analysis, the appeals unit sometimes projects costs using trend factors or uses unaudited expenditures because a current CFR is not available.

During 1991, OMRDD awarded $22.4 million in rate appeals, an increase of about 40 percent from the two prior years for which appeal award data were available (see Chart II). Of the 392 appeal files "closed" in these years, 84 percent or 328 were granted in whole or in part, and 16 percent or 64 were denied or withdrawn.

Direct Care and Clinical staffing cost categories were frequently appealed for both ICFs and CRs, accounting for over 38 percent of appeals in 1991 (see Chart III). The appeals typically were granted to fund additional staffing because of increases in client severity mix. Appeals of Administration, Other Than Personal Services (OTPS), and Fringe Benefit cost categories, which accounted

12 In this report, the term "appeal" is used to refer to an appeal file. A rate appeal file typically includes appeals for several sites and/or cost categories for an individual provider which, because of the agency-wide surplus/loss analysis, must be processed simultaneously.

for another 49-51 percent of appeal awards, generally involved funding for operating costs that increased dramatically from the base year. For example, Fringe Benefits were often appealed due to escalating health care costs. The appeal process was also used to cover losses in revenue caused by bed vacancies or shortfalls of resident Supplemental Security Income (SSI) payments.

A revised rate is not considered final until granted by OMRDD and approved by the State Division of the Budget (DOB), and formal notification sent to the provider. At no point in the appeal process does the provider have a right to any form of interim determination. If a provider accepts the rate proposed in this "first level" appeal, the provider waives any right to further administrative or judicial review.[13]

In the event that a provider is not awarded some or all of the relief requested in the first level appeal, the provider has 30 days to reject the award and pursue a "second level" appeal by informing the OMRDD Commissioner in writing of its intent to proceed toward an administrative hearing, and to set forth the "appealable factual issues" and documentation to support the provider's position. If the provider rejects OMRDD's offer and requests a second level appeal, and it is determined that no appealable issue has been raised, the proposed first level determination will be certified by the OMRDD Commissioner and put into effect. If it is determined that appealable issues are raised, the proposed award is considered withdrawn and the administrative hearing will lead to a reimbursement rate that may be greater than, equal to, or less than the proposed reimbursement rate at the first level appeal. Since at least 1988, there have been no administrative hearings held in response to provider requests for relief from first level appeal decisions.

13 Prior to July 3, 1991, a provider could accept a first level appeal determination without waiving its right to further administrative or judicial review of the portion of an appeal that was denied. In order to limit its exposure in cases involving large appeal awards, it was OMRDD's practice to "negotiate" settlements if a provider was willing to waive its right to further litigation.

System Not Operating As Designed

While the rate making methodology as developed by OMRDD appears to be a reasonable means of carrying out the statutory duty, in practice, the effectiveness of OMRDD's rate methodology to promote efficiently delivered care is being eroded for several reasons:

- "base" year rates have not been recomputed since 1986/87, allowing 40 percent of ICF providers to receive rates based on budgets instead of the actual cost of providing quality services;[14]
- screens are routinely exceeded in the rate appeal process;
- disability level scores have not been used in the appeal process to reflect changes in client characteristics and associated staffing levels;
- over 30 percent of the providers have their rates increased each year through rate appeals; and,
- confidence that rates are efficient is not assured since over 50 percent of ICF sites have rates impacted by previous appeals that are routinely "rolled over" into future years without validation.[15]

In a system where rates were intended to be efficient and appeals the exception, appeals are commonplace, calling into question the reliability of the rate setting system itself. When many providers regularly claim that they cannot meet their costs under the rates set for efficiently run facilities, OMRDD cannot be sure without examining spending practices whether rates are reasonable and adequate. However, such an examination of industry spending practices is not conducted regularly.

14 For federal fiscal year ended September 30, 1992, the NYS Department of Social Services recorded $679 million in expenditures for community-based ICFs. This would mean that about $270 million of ICF reimbursement was based on budgeted costs.

15 Based upon a random sample of 62 ICF sites (90% confidence level), 53 percent of all ICF rates were impacted by a previous appeal with 31 percent of the rates impacted by multiple appeals.

System Is Susceptible to Abuse

As a government agency charged with administering substantial public funding, OMRDD has an affirmative duty to ensure that its employees know and comply with their statutory and fiduciary responsibilities. Procedures and process for disbursing funds, auditing appeals and recouping overpayments should be formalized and followed with regularity. Yet, the Commission has found few formal written procedures for processing appeals and has noted cases where proper reviews were not conducted before rate appeals were granted. Furthermore, the failure to ensure that appeal monies are spent as intended has resulted in millions of dollars of public funds being misdirected and the chances of their recovery negated because of questionable decisions by OMRDD and its Counsel's office.

Rollover Appeals

OMRDD rate appeal regulations clearly intend that additional reimbursement be restricted to the specific purpose of the appeal decision. Because the appeal process can award additional funds to providers over and above rates set through the normal process, OMRDD apparently sought to attach special restrictions to this extra funding. Regulations for ICF programs found at 14 NYCRR 681.12(d)(9) state that **"Any additional reimbursement** received by the facility, pursuant to a rate revised in accordance with this subdivision, **shall be restricted to the specific purpose set forth in the appeal decision"** (emphasis added). The regulations for community residence programs at 14 NYCRR 686.13(j)(10) are even clearer by further stating that "If the provider does not spend such reimbursement on such specific purpose, **OMRDD shall be entitled to recover such reimbursement"** (emphasis added).

In order to determine provider compliance with these regulations, OMRDD's Bureau of Management and Fiscal Audit conducted audits of high dollar rate appeals awarded (excluding appeals awarded via settlements). The audit bureau recommended that OMRDD recoup over $2.4 million from 24 providers for the years 1986 to 1990[16] because the providers either did not use the additional funds awarded for the specific purpose appealed or in many cases did not even spend the additional funds. However, because of a ruling from its Counsel's office, the OMRDD audit bureau subsequently reversed $1.8 million of the proposed disallowances.

The reversals concerned "rollover funds" which involved appeals that had been granted in a previous year and then "rolled-forward" to subsequent years, presumably because the provider still had the specific need for the additional funds. OMRDD Counsel's office interprets its regulations to apply only to the **initial** year for which a rate appeal has been granted, even though the regulations do not state

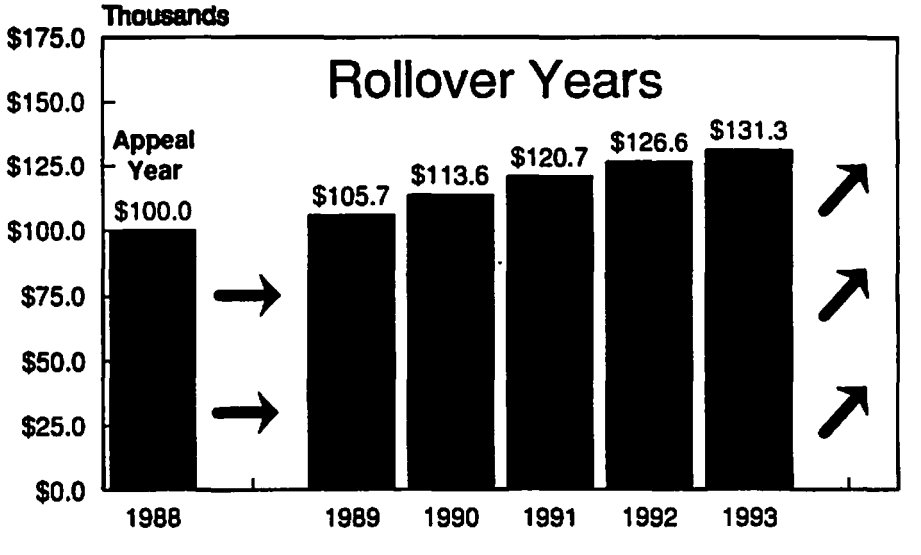
16 OMRDD had issued 21 final and three draft audit reports with recommended disallowances totalling $2.4 million.

this limitation (Appendix B). This opinion differs from the OMRDD audit bureau interpretation which sought to restrict the spending of rollover funds. However, in Counsel's opinion, rollover funds cannot be disallowed even when funds have not been spent on the appeal purpose or not spent at all. This legal opinion has already affected $1.8 million in proposed audit disallowances and can continue to have a serious adverse consequence on the efficient expenditure of public funds.

Chart IV illustrates how this decision could impact on a provider. Assuming that OMRDD's audit bureau disallowed $100,000 from an appeal year, over the following five years (trended forward) an additional $597,900 in rolled forward expenditures would be allowed based on this legal opinion. In other words, a disallowance of $100,000 would be recouped from the provider for the appeal year, but the provider would be allowed to keep the remaining $597,900 (received over the next five years) and spend it without restriction or retain it as a surplus.[17]

Chart IV

Rollover Funds Example



17 Even after the $100,000 disallowance has been established, repayment will typically not commence for at least a year while it is being processed by OMRDD, and will be spread over a two- to three-year period with no interest on this debt.

Based on Counsel's opinion, OMRDD's audit unit retracted its findings and amended its audit reports to reflect $1.8 million in reduced disallowances. The Commission examined $1.4 million of the reversed rollover disallowances and found that over $600,000 was not spent for the purpose appealed and another $800,000 was not spent at all by the providers.[18] For example, the OMRDD audit of Sullivan County ARC, covering the years 1988-90, found appeal dollars totaling $220,000 were not spent to operate its 40-bed Bennett ICF. The Commission's look beyond the OMRDD audit period found that in 1991 and 1992 the site received another $412,000 of appeal funding which was also not spent. OMRDD has no plans to reduce or audit future rollover funding (Appendix C).

OMRDD's allowing providers to retain these rollover funds without restriction or accountability permits a misuse of public funds. Notably, prior to OMRDD Counsel's opinion, the Commission found that of the 21 final audit reports released, over half of the providers **agreed** with the auditors' disallowance findings and, in many instances, further agreed to pay back the funds identified as being improperly obtained.

Negotiated Settlements

More disturbing, it has been OMRDD's practice to grant appeal settlements without holding them to the purpose of the appeal or subjecting them to an audit. Not only does this allow inconsistent treatment to those providers often times receiving the largest rate adjustments,[19] but also there is no follow-up fiscal analysis or concern whether these public monies will be used as intended for the benefit of the program or its clients.

Illustrative is a 1991 settlement with the Young Adult Institute, Inc. (YAI). In this instance, YAI sought to increase its rates by approximately $2.6 million for 27 specifically designated facilities; OMRDD settled with the agency for $2.1 million. However, because YAI was concerned that an audit would limit its expenditures to the spending categories appealed (as required by regulations), it sought and was granted assurances from OMRDD that the settlement funds would not be audited (Appendix D). It also sought and was granted confirmation that OMRDD

18 OMRDD is considering a policy shift towards recouping rollover dollars from providers which did not spend the appeal year dollars as required in the first year. This may affect a Putnam ARC rollover of $134,281, two years of which are included in the above figures. However, this policy change would not affect providers which spend the appeal dollars in the year for which they are granted, but do not spend them for the purpose specified in future years, or do not spend them at all.

19 Although settlement awards occur less frequently than rate appeal awards, they involve large dollar amounts. For example, in 1991, three providers received settlements totaling $3.7 million, while the average appeal award in 1991 was about $180,000.

considered its rates as efficient and economical. In a June 13, 1991 letter, the OMRDD Commissioner acknowledged both of these requests (Appendix E).

Conversely, the Commission found one provider, the Terence Cardinal Cook Health Care Center, where the settlement agreement awarding $676,000 specified that there would be a follow-up fiscal audit and that any audit adjustments would be used to reduce rates.

OMRDD's failure to insist on procedural regularity over the accountability for settlements permits inconsistent treatment of providers.

Rate Appeals Finance Mismanagement

The Commission encountered two instances where appeal award money went into agencies with deteriorated financial positions which stemmed from mismanagement and diversions of agency funds away from resident care for unexplained purposes.

In the case of CLA, OMRDD closed its appeal file in April 1992 and transmitted revised rates to cover three additional staff who were supposed to have been hired in July 1989. However, OMRDD never verified whether the staff were actually hired. Although the CLA cost report for 1989/90 was severely delinquent, OMRDD did not require its submission to corroborate the hiring of staff. Furthermore, in January 1992, months before OMRDD closed the appeal, a 1990/91 CLA cost report was received by OMRDD which showed that there was no increase in staffing.

In June 1992, when CLA received a $138,798 appeal check for the increased staffing, it was used instead to pay off $40,000 of delinquent payroll taxes and penalties. Most of the remainder of the check proceeds disappeared in cash payments made by the executive director for unexplained purposes. Had OMRDD looked first at financial records which were on file in its own office at the time the appeal was granted, it would have been obvious that 25 percent of the agency funds were flowing out of the agency in checks written to cash and that the agency's checking account was substantially overdrawn. This should have alerted OMRDD to make inquires about potential financial irregularities at this problem agency before issuing the appeal check, which was to cover retroactive staffing costs that were never incurred.

In a second situation, in January 1989, OMRDD offered a $1.9 million settlement to fund an accumulated deficit at the Federation of Puerto Rican Organizations of Brownsville Inc. (FPRO), which had a long history of financial problems and mismanagement. This was done without OMRDD having completed an audit of FPRO's finances to insure that its funds were only being used for the efficient and economic operation of FPRO's ICF and CR programs. After

FPRO's rejection of the settlement, OMRDD found that a major cause of FPRO's deficit was $900,000 in questionable and undocumented costs which had been charged to its OMRDD programs. These included the misapplication of OMRDD funds to cover the costs of other programs which FPRO operated, and other questionable transactions including a trip to Puerto Rico for agency officials and non-interest bearing loans to employees. These apparent abuses were facilitated by the near total absence of internal controls at the agency and the executive director's use of a hidden bank account.

In 1991, even though FPRO had not fully implemented OMRDD's audit recommendations designed to address its internal control and board oversight weaknesses, OMRDD granted FPRO a $1.7 million retroactive rate increase covering April 1986 to February 1990 which essentially underwrote the cost of the past fiscal mismanagement of the agency without fully addressing the fundamental management problems.[20] The apparent rationale for this decision was to rescue this provider from bankruptcy.

20 This sum is in addition to a $320,000 rate appeal "advance" granted in 1989.

Internal Problems in Processing Appeals

The Commission also found numerous internal problems in the accuracy and reliability of the mechanism used to assess appeals. Most disturbing was a lack of written procedures for processing rate appeals. This has lead to inconsistent approaches to processing appeals by individual analysts and inequitable treatment among providers. These inconsistent approaches by staff are apparently not detected or corrected at supervisory review levels although all appeals go through multiple levels of internal review before being forwarded to the Division of the Budget for approval. Moreover, the system for reviewing appeal awards is vulnerable to error because voluminous past records on appeals are filed haphazardly without any kind of spreadsheet summary on appeal history. The Commission noted numerous cases where providers received duplicative funding of costs for the same period and incorrect numbers were used for rate calculations.

Double Reimbursement of Property Costs

In processing an appeal, OMRDD prepares a surplus/loss analysis by cost category which attempts to compare the base year allowable costs to those costs currently being incurred by the provider. Because of the changing cost reporting structure, the current CFR reporting format is quite different from the 1986/87 cost reports. Since the categorical screens are based on the 1986/87 reported costs, it is necessary to realign the CFR reported costs in order to coincide with costs built into the rates. This realignment must be performed or else a provider may receive more appeal funding than is warranted. This is particularly true when it comes to the reclassification of property costs.

The surplus/loss analysis is designed to ignore property costs and property reimbursement because OMRDD annually updates the rates for changes in property expense. By improperly incorporating certain property costs into the appeal analysis, OMRDD has reimbursed costs (averaging about $24,000 for each ICF provider) through the appeal process, while also reimbursing the same costs through its annual property updates. Consequently, the Commission estimates that ICF and CR providers receiving appeals had their deficits overstated by a total of $1.4 million annually, potentially subjecting this amount to double reimbursement.

Payment of Administration Costs in Excess of Screens

Although OMRDD officials are adamant that the administration screens are rarely pierced, the Commission has found that OMRDD's appeal methodology

frequently **indirectly** grants funds in excess of ceilings for administrative salaries and other costs. This occurs primarily because the appeals cost analysis considers costs for administration which are over screens as part of the agency's deficit thus making these expenses eligible for reimbursement in the surplus/loss analysis.

The Commission has found at least seven cases where this had occurred. For example:

- Young Adult Institute (YAI) received a settlement appeal award which indirectly allowed it to cover $95,000 in excessive administration costs. The YAI executive director and assistant director were among the highest paid executives in the OMRDD system, each earning in excess of $180,000 in 1990/91.
- Independent Living Association (ILA) received a 1990/91 appeal award which indirectly covered $91,000 in excessive administration costs. In the following year, ILA received an additional award enabling it to cover $130,000 in excessive administration costs. The OMRDD file for the 1991/92 ILA appeal contained a cost analysis of administration expenses which showed that the controller and executive director were receiving large pay increases. Over a two-year period, reported costs for the ILA controller escalated from $60,323 to $102,420. During the same period, the executive director of ILA had his pay raised from $85,400 to $114,400, a 34 percent increase. OMRDD funded much of these excessive administration costs through its appeal process.
- The Association for the Advancement of the Blind and Retarded, Inc. received a 1988/89 appeal award which indirectly funded $62,000 of administration costs despite the fact that a note in the OMRDD appeal file stated "there will be no additional money made available in the Admin. category to this agency" because a "special investigation has found improprieties on Admin. payroll."

Reduction in Administration Screen Overridden

In 1992, as a cost-cutting measure DOB directed OMRDD to reduce its administration screens by two percent. OMRDD, however, exempted all of those providers with rollover appeals built into their administration rates. The Commission selected three providers (YAI, ILA, and the United Cerebral Palsy Association of New York City) with past appeal awards for administration and found that $49,000 in annual reductions were avoided because of this treatment. OMRDD contends that this budget-motivated reduction violates assurances it made to the federal government under the Boren Amendment that these appealed rates be

"reasonable and adequate." But, as indicated earlier, there is no necessary correlation between having rollover appeal funds and a continuing need for this additional funding.

Haphazard Files and Errors Result in Appeal Overpayments

Due to systemic flaws in the internal review process, coupled with sloppy record keeping, the Commission found many processing errors which were not detected by staff performing basic accuracy checks. The errors included the use of wrong rate sheets, the use of incorrect numbers from rate sheets, and the pulling of wrong data from the cost reports in the surplus/loss analysis. This resulted in improper appeal amounts being awarded to providers.

In one case, OMRDD awarded an appeal to Sullivan County ARC for $84,000 when, in fact, the agency only requested an $8,000 increase. Although the provider was basically requesting a shift in staff from clinical to direct care, OMRDD awarded appeal funds for the direct care staff without decreasing the clinical care rate. This enhanced funding to Sullivan ARC contributed to surplus revenues for which OMRDD has no intention of recouping (See, Supra, Discussion at p. 10). In another appeal case, OMRDD overpaid CLA $17,500 because of a trending error which should have been detected upon review.

OMRDD files which document the amount of appeals built into rates are also haphazard, thus creating an environment which facilitates the improper awarding of future appeals. For example, in one of the instances found by the Commission, Niagara County ARC received a double appeal payment for the same period (1990) because OMRDD failed to consider a previous appeal award and erroneously funded an additional $25,900 to the agency. This same appeal package also contained many data errors causing an overstatement of the agency's deficit subject to appeal reimbursement. Such errors reinforce the need for stricter guidelines, controls, and review procedures.

Revenue from High Occupancy Levels Ignored

OMRDD does not properly calculate the revenue for the large number of providers that operate at an occupancy level (e.g., 100 percent) that exceeds the level on which their rates are based (e.g., 99 percent). This leads to higher per diem revenues and, therefore, higher total revenues. The Commission estimates that ICF providers receiving appeals had their deficits overstated by a total of

$474,000 annually because full revenue was not considered in the appeal calculations. This flaw is costly, especially when considering that the same type of error has occurred in the processing of CR appeals.

Flawed Vacancy Calculation

OMRDD allows appeal reimbursement for unbillable vacant beds when providers can justify the vacancies. However, DOB has requested that vacancy reimbursements be reduced by the amount of variable costs which are built into the rate. The theory behind this reduction is that certain expenses, such as food costs, will not be incurred if the bed is empty and therefore should not be reimbursed.

In response to DOB's request, OMRDD devised a "boiler plate" formula to offset vacancy reimbursements by such variable costs. Yet, OMRDD's standardized formula to reduce funding of variable costs is mathematically flawed and virtually eliminates the variable cost reduction. This has resulted in excessive appeal awards which are not being reduced in accordance with DOB's request. The Commission examined one vacancy appeal award for 1990/91 for ILA. It found that the $366,000 award for four sites was overvalued by $31,270.[21]

In 1991, there were $1.5 million in vacancy appeal awards that were susceptible to this same type of error.

21 For example, ILA's 10-bed Pacific Street site received no funding through the Medicaid program for a bed that was vacant for 365 days. OMRDD concluded that ILA was entitled to receive funding for other than "client sensitive" variable costs through the appeal process for the vacant days. However, when OMRDD calculated the appeal award, total variable costs ($57,223) were erroneously reduced to 10.1 percent ($5,779) even though this 10.1 percent (should be 10 percent) vacancy factor is again applied at a later point in the calculation. This resulted in a double reduction in non-reimburseable "client sensitive" variable costs which inflated the appeal award by $5,781 for the Pacific Street site and $31,270 for all four ILA sites.

	OMRDD Calculation	Corrected Calculation
Total cost built into rate	$644,939	$644,939
Less variable costs in rate	5,779	57,223
Total less variable costs	639,160	587,716
X percent of vacant days	x 10.1%	x 10.0%
Appeal award	$ 64,553	$ 58,772
Error (Pacific Street site)	$ 5,781	
Error for all four ILA sites combined	$31,270	

Reimbursement of Non-Allowable Costs

The Commission found that the OMRDD appeals unit granted appeals without excluding costs which by the provider's own admission were considered non-allowable. Within the annual cost report, providers disclose certain costs as being non-allowable; yet, the OMRDD appeals unit has not deducted such costs from the amounts subject to appeal awards. Although the Commission only came across a couple instances involving three to four thousand dollars, clearly, such costs should not be subject to appeal reimbursement.

Conclusion

OMRDD has the statutory obligation to ensure that rates are sufficient to cover the costs of efficiently run facilities. Yet, the Commission has found that appeal funding has been routinely granted in excess of ceilings intended to control excessive costs; appeal funding has been used as a substitute for effective regulation of problem agencies; appeal monies not spent, or used for other than requested purposes, are not being recouped for rollover years; and, certain providers receive large lump sums through appeal settlements without being subjected to spending restrictions and audits. Additionally, because of the failure to follow written procedures, sloppy record keeping, and a failure to take periodic looks at provider spending practices, there is little assurance that OMRDD can contain costs.

The findings of this review indicate that most of the weaknesses uncovered are systemic in nature and affect the payment of large amounts of public funds to providers of service. Although the system for processing rate appeals is supposed to have multiple stages of review, approval, and follow-up audits to minimize the risk of erroneous or improper decisions, the Commission's review found that these methods of internal control were not working as intended.

The Commission is concerned that the irregularities in the process of reviewing and granting rate appeals, the lack of accountability for how appeal funds are actually spent, and questionable legal interpretations of OMRDD regulations that essentially place provider decisions to spend public funds on purposes unrelated to the appeal beyond scrutiny have combined to place a low priority on ensuring the fundamental legal objective of "efficient and economical" rates.

Recommendations

1. Currently, OMRDD Counsel's office does not believe its regulations permit it to recover unspent or misspent rollover appeal funds. Therefore, OMRDD should revisit and review the validity of the Counsel's opinion, and consider modifying its regulations and policies to safeguard the expenditure of public monies.

2. OMRDD should only grant settlements with the condition that the funds are subject to audit and could be disallowed if not spent on the purposes stated in the appeal. The OMRDD Bureau of Management and Fiscal Audit should discontinue its practice of avoiding the auditing of settlements.

3. As part of the appeal review process, there should be coordination between OMRDD's Division of Administration and Revenue Support and its Division of Standards and Regulatory Compliance to assure that appeal money is not used to finance mismanaged programs. When programs are found to be unsound, an on-site fiscal review should be conducted to assess the "financial responsibility" of operators and underlying management problems corrected before additional taxpayer monies are placed at risk.

4. There are many areas which OMRDD should address to correct its current appeal processing methods.

   - OMRDD should develop uniform guidelines and procedures to enable accurate and equitable processing of appeals.
   - OMRDD should correct its surplus/loss analysis in order to accurately realign costs, particularly property costs, so that proper appeal awards can be determined.
   - OMRDD should better maintain its appeal files especially in the area of documenting rate changes resulting from appeals.
   - OMRDD should correct the mathematical flaw in its standard vacancy appeal calculation.
   - OMRDD should correct its surplus/loss calculations in order to accurately reflect revenues for the many providers whose rates are based upon less than full occupancy.
   - OMRDD should avoid the indirect funding of costs above the administrative screen by not including such costs as part of an agency's deficit in the surplus/loss analysis.

- OMRDD should reconsider applying the two percent administration screen cut to all providers with rollover administration appeals built into their rates.
- OMRDD should exclude provider's self-reported non-allowable costs from the surplus/loss analysis to avoid reimbursing such costs through the appeal process.
- Supervisory review by OMRDD officials should be more rigorous to reduce or eliminate erroneous or inconsistent handling of appeals by individual analysts.

Appendix A

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE • ALBANY • NEW YORK • 12229-0001

THOMAS A. MAUL
Commissioner

Executive Deputy Commissioner

January 19, 1994

Mr. Clarence J. Sundram
Chairman
Commission on Quality of Care
for the Mentally Disabled
99 Washington Avenue, Suite 1002
Albany, NY 12210-2895

Dear Mr. Sundram:

I recently concluded my review of the Commission's audit report concerning the OMRDD's rate appeals process. The report contained a number of valuable recommendations. I have, therefore, advised staff to immediately implement certain of these recommendations. Pursuant to my direction, the Rate Appeals Manual will be updated and expanded. The surplus/loss calculation utilized in the appeal process has been revised to remove unallowable costs and to include revenues generated from 100 percent occupancy.

Certain of the processes targeted in the audit were in place during the period of the audit, but were temporary situations which were corrected, prior to the audit. I am specifically referring to the realignment of property costs in the surplus/loss calculation.

Staff are currently analyzing the report and will be preparing the formal response. Coincidental to this analysis will be a request to CQC for a review of the associated work papers and statistical calculations contained in the report.

Although the report contained many valuable recommendations and insights, inherent in the document was substantial editorial license and many superficial conclusions. The formal response will address these issues in a thorough manner thereby clarifying any misinterpretations by CQC.

I sincerely appreciate the valuable work that resulted in the report and commend your staff's efforts to absorb and understand a process as complex as rate appeals.

Please contact me if you wish to further discuss the contents of the report.

Sincerely,

Thomas A. Maul
Commissioner

c: Mr. Kaplan
Mr. Cody
Mr. Hogeboom

Appendix B

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE • ALBANY • NEW YORK • 12229-0

ELIN M. HOWE
Commissioner

THOMAS A. MA
Executive Deputy Commissio

MEMORANDUM

January 20, 1993

To: Thomas Maul

From: Paul R. Kietzman

Subject: Audits

Counsel's Office has received an audit appeal hearing request from UCP/Western New York. Two of the issues concern findings that amounts granted for rate appeals both in the ICFs and CRs were not spent in subsequent years for the same cost categories for which the appeals were granted. The regulations at issue are as follows:

14 NYCRR §681.12(d) (9) - Any additional reimbursement received by the facility, pursuant to a rate revised in accordance with this subdivision, shall be restricted to the specific purpose set forth in the appeal decision.

12 NYCRR §633.13(f) (10) - Any reimbursement received by the facility pursuant to a fee revised in accordance with this subdivision shall be restricted to the specific purpose set forth in the first or second level appeal decision. If the provider does not spend such reimbursement on the specific purpose, OMRDD shall be entitled to recover such reimbursement.

While there is agreement between DQA, DARM and Counsel's Office that any rate/fee adjustments must be spent in the specific categories in the rate appeal year, there is disagreement on whether these regulations would require that the adjustments be spent on the same cost category in subsequent years.

Counsel's Office position is as follows:

1. Although both regulations require that any rate/fee adjustment must be spent in the specific categories granted in the appeal, we interpret this to require spending in the appealed categories only in the rate/fee appeal period.

2. There is no reference in either regulation to a requirement that a granted appeal be restricted to those same cost categories for subsequent years. If in fact this is the intent of the regulation, a reference to subsequent years should be in the regulation.

3. In the absence of a specific reference to a spending requirement in subsequent years, such a mandate conflicts with the budgetary interchange policy which allows providers to shift spending among the cost categories. In addition, the promulgation of this regulation originally contemplated a change in the base year every two years. Had this occurred, this issue would have been moot.

In the case of UCP/WNY, a facility determined by DQA to have utilized rate appeal adjustments for a different category than originally appealed, DAPM has determined that the facility had incurred deficits which more than made up for the audit disallowances.

It is Counsel's Office recommendation that DAPM and DQA decide which interpretation they wish to follow. Depending on what they want to do we may have to revise the regulations. However, if the decision is to limit this spending requirement only to the rate appeal period, it is Counsel's Office position that the regulations as the are currently written do not support disallowances for subsequent years and would not have to be amended.

PRK:KSH

cc: Alden Kaplan
Thomas Cuite
Richard Cody
Philip Joyce

Appendix C

OMR :A (4-78)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

INTRADEPARTMENTAL CORRESPONDENCE

TO: BMFA Audit Appeals File

FROM: Mr. Joyce

DATE: January 26, 1993

SUBJECT:

Audit of Rate/Fee Appeals

ADDITIONAL COPIES TO

Mr. Cuite

As Mr. Cuite and I agreed during our January 14, 1993 meeting, the Bureau of Management and Fiscal Audit will change its audit procedures which will result in rate/fee appeals only be audited for the initial appeal period. Adjustments for not using the additional revenue or not using the revenue for the items detailed in the appeal will also be limited to the initial appeal period.

We also agreed that BMFA will provide DARM with a breakdown of the adjustments by initial period and subsequent periods for all Final Audit Reports. Reports which have been issued in Draft will be adjusted and Revised Draft Report will be issued to the Agencies. And finally, all audit reports in development will include adjustments only for the initial appeal.

This change in policy and audit procedure is a result of Counsel's opinion (See attached January 20, 1993 memorandum) that the regulations do require the spending of money for specific purposes in the initial rate period, but does not hold the Agency to the same requirement for subsequent periods. Counsel has already stated that they do not believe OMRDD would be successful in the adjudication of an audit appeal based on these regulations. Therefore, we concluded that the Division of Quality Assurance had no choice but to amend the audit reports and change our current auditing procedures. One appeal has already been filed and additional appeals will certainly be filed if the original appeal was successful. In addition, without Counsel's support, Quality Assurance would not have the opportunity to defend its position in a hearing even if the Agency were to be granted a hearing by the Commissioner.

PFJ/masp
Ref.: CAP

Attachment

Appendix D

OMRDD
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE • ALBANY • NEW YORK • 12229-0001

ELIN M. HOWE
Commissioner

THOMAS A. MAUL
Executive Deputy Commissioner

MEMORANDUM

TO: Commissioner Elin Howe

FROM: Richard T. Cody

DATE: June 14, 1991

SUBJECT: YAI Settlement Agreement

For some time, we have been negotiating a settlement agreement with YAI. Finalizing the agreement has taken longer than originally anticipated due to various concerns expressed by YAI regarding the terms and language of the settlement agreement. In particular, YAI is concerned that an audit may limit the provider to its categorical expenditures, thus disallowing funding already granted through the settlement.

We have explained that this situation cannot happen since settlement agreements are not governed by the rate appeals regulations requiring such action. In fact, settlement agreements are not governed by any regulation. We had hoped that this information would be sufficient to alleviate YAI's anxiety over the audit process and permit us to promptly finalize the settlement. Instead, YAI has requested written assurance from you regarding the above matter.

In addition, YAI is uneasy because the settlement agreement does not refer to the revised rates as "efficient" and "economic". We would like to include another statement in your letter to YAI confirming that the rates were calculated in accordance with rate setting regulations and as such are considered to be efficient and economical.

Counsel's Office has advised against making changes of this nature to the settlement agreement itself. Therefore, addressing these matters in a letter avoids changing the "boiler plate" portions of the agreement as well as satisfies YAI's apprehension about certain terms and/or language in the settlement agreement. We feel strongly that your letter is needed before YAI will agree to sign the agreement.

I appreciate your concern about this matter and am available to discuss it further with you at your earliest convenience.

Thank you.

cc: Mr. Hogeboom
Mr. Flynn
Ms. Grasso

Appendix E

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE • ALBANY • NEW YORK • 12229-0001

ELIN M. HOWE
Commissioner

(518) 474-7700
Fax: (518) 474-7382

THOMAS A. MAUL
Executive Deputy Commissioner

June 13, 1991

Joel M. Levy
Young Adult Institute, Inc.
460 West 34 Street
New York, NY 10001-2382

RE: Settlement Agreement

Dear Mr. Levy:

This letter is to confirm our mutual understanding of two issues relative to the settlement agreement for twenty-seven specifically designated YAI facilities, including eighteen ICF/DDs and nine CRs.

First, you have asked that in the event of an audit of any of these programs, that expenses not be subject to categorized areas originally appealed as provided in 14 NYCRR 681.12(d)(10) and 14 NYCRR 686.13(f)(11). Since any monies granted to YAI are being granted as part of a settlement and not an appeal, neither of these regulations is applicable to this settlement agreement.

Secondly, you have asked that OMRDD acknowledge that the rate adjustments in this settlement agreement are efficient and economic for the operation of these facilities. The federal statutory standard for reimbursement rates requires that rates be reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. 42 U.S.C. 1396a(a)(13)(a). Although the efficient cost standard does not require OMRDD to reimburse individual providers for costs they actually incur, at the time of this settlement, the rate adjustments in this settlement agreement are efficient and economic for these twenty-seven facilities.

I appreciate the time and attention you have given to the terms of this settlement agreement. I look forward to continuing the ongoing "partnership" between OMRDD and YAI.

Sincerely,

Elin M. Howe
Commissioner

EMH/PRK

COMMISSION ON QUALITY OF CARE FOR THE MENTALLY DISABLED

MISSION

The Commission on Quality of Care for the Mentally Disabled provides independent oversight of the State and local mental hygiene systems that collectively spend more than $5 billion in public funds annually. The Commission monitors conditions of care in State institutions for the mentally ill and mentally retarded, licensed residential facilities, and outpatient programs; reports to the Governor and Legislature on how the laws and policies established to protect the rights of mentally disabled persons are being implemented; and makes recommendations to assure improved quality of care.

ORGANIZATION AND STAFFING

Headquartered in Albany, the Commission consists of a full-time chairman and two unsalaried members, each appointed by the Governor and confirmed by the Senate to serve for staggered five-year terms. During 1996-97, the agency will have a workforce of 73 positions funded by the General Fund, Federal Grants and other Federal revenues related to oversight of Medicaid programs.

FISCAL BACKGROUND AND BUDGET HIGHLIGHTS

The Commission's State Operations appropriation, which comprises 97 percent of the total agency budget, consists of 32 percent General Fund, 48 percent Federal, and 20 percent Other funds.

Federal funding provides statewide protection and advocacy services for individuals with disabilities, using State staff and contracts with non-profit agencies, through these Federal programs: Protection and Advocacy for the Developmentally Disabled, Client Assistance, Protection and Advocacy for Individuals with Mental Illness, and Protection and Advocacy of Individual Rights programs.

Other funds include the Federal Salary Sharing account which is funded by Federal revenue generated by agency staff activities related to Medicaid services. A combination of State tax dollars from the General Fund and Federal Salary Sharing accounts support staff investigations of deaths and allegations of abuse and neglect in mental hygiene facilities.

The Aid to Localities appropriation, which comprises 3 percent of the total agency budget, funds contracts with private, non-profit service provider agencies. Taxpayer dollars from the General Fund support contracts with non-profit agencies that provide advocacy services to residents of adult homes and adult care facilities. Contracts with non-profit Community Dispute Resolution Centers which provide support services for the Surrogate Decision Making Committee program are supported by taxpayer General Fund dollars and Federal Salary Sharing account funds.

The Executive Budget all funds recommendation of $8,014,900 streamlines agency operations and achieves savings in the General Fund of $800,000 while preserving core oversight functions associated with client deaths and abuse investigations. Highlights of recommendations include:

- Consolidating agency operations through closure of the New York City office.
- Streamlining agency operations including elimination of the Policy and Fiscal Investigations functions, which are not statutorily mandated.

PROGRAM HIGHLIGHTS

Consistent with its mission, the Commission performs the following activities:

- Investigates allegations of child abuse and neglect in residential programs reported to the Department of Social Services Central Register and critiques investigations of allegations not accepted by the Central Register;
- Reviews adult abuse allegations and conducts investigations into the most serious of these cases;
- Responds to complaints about the quality of care provided by State-operated or -licensed mental hygiene programs.
- Reviews deaths of individuals in State licensed/operated facilities and conducts investigations into the 20 percent of cases which appear unusual or unnatural;
- Conducts unannounced site visits to examine various aspects of mental hygiene program operations;
- Provides advocacy on behalf of individuals and groups through negotiations, administrative proceedings, legislation and litigation;
- Administers the Surrogate Decision-Making Committee program which makes decisions about major medical treatment for individuals in residential facilities who are not competent to make such decisions and who have no legal surrogate; and
- Issues public reports to the Governor and the Legislature on these activities, and recommends legislative, budgetary and administrative reforms.

ALL FUNDS
APPROPRIATIONS

Category	Available 1995-96	Appropriations Recommended 1996-97	Change	Reappropriations Recommended 1996-97
State Operations	$9,725,700	$7,771,900	-$1,953,800	....
Aid To Localities	80,000	243,000	+163,000	....
Capital Projects	....	....	....	....
Debt Service	....	....	....	....
Total	$9,805,700	$8,014,900	-$1,790,800	....

ALL FUNDS
DISBURSEMENTS

Category	Estimated 1995-96	Estimated 1996-97	Change
State Operations	$8,334,000	$7,771,900	-$562,100
Fringe Benefits - General Fund	N/A	601,400	
Aid To Localities	160,000	243,000	+83,000
Capital Projects	....	....	....
Debt Service	N/A	....	
Total	$8,494,000	$8,616,300	

Note: 1995-96 Disbursement column does not include disbursements for Fringe Benefits - General Fund and Debt Service because they were budgeted centrally. Generally, the 1995-96 cash disbursement estimate does not reflect disbursements for transferred entities, to ensure consistency with the State Accounting System.

REVENUES IN SUPPORT OF APPROPRIATIONS
(PERCENT)

Category	Estimated 1995-96 State	Federal	Other	Recommended 1996-97 State	Federal	Other
State Operations	37	43	20	32	48	20
Aid To Localities	100	....	....	65	....	35

ALL FUND TYPES
LEVELS OF EMPLOYMENT BY PROGRAM
ANNUAL SALARIED POSITIONS

Program	Available 1995-96	1996-97 Recommended Average Fill Level: Personal Service (Regular)	Maintenance Undistributed	Total Recommended 1996-97	Change
Administration					
General Fund	54	44	....	44	-10
Special Revenue Funds—Other	23	17	....	17	-6
Protection and Advocacy for the Developmentally Disabled					
Special Revenue Funds—Federal	13	13	....	13	....
Protection and Advocacy for the MentallyIll					
Special Revenue Funds—Federal	11	11	....	11	....
Client Assistance					
Special Revenue Funds—Federal	2	2	....	2	....
Subtotal, Direct Funded Programs	103	87	....	87	-16
Suballocations:					
Special Revenue Funds—Federal	1			1	....
Total	104			88	-16

STATE OPERATIONS
ALL FUNDS FINANCIAL REQUIREMENTS BY FUND TYPE
APPROPRIATIONS

Fund Type	Available 1995-96	Recommended 1996-97	Change
General Fund	$3,615,300	$2,478,000	-$1,137,300
Special Revenue Funds—Federal	4,193,300	3,762,900	-430,400
Special Revenue Funds—Other	1,897,100	1,531,000	-366,100
Enterprise Funds	20,000	....	-20,000
Total	$9,725,700	$7,771,900	-$1,953,800

STATE OPERATIONS
ALL FUNDS FINANCIAL REQUIREMENTS BY PROGRAM
APPROPRIATIONS

Program	Available 1995-96	Recommended 1996-97	Change
Administration			
General Fund	$3,615,300	$2,478,000	-$1,137,300
Special Revenue Funds—Federal	150,000	....	-150,000
Special Revenue Funds—Other	1,897,100	1,531,000	-366,100
Enterprise Funds	20,000	....	-20,000
Protection and Advocacy for the Developmentally Disabled			
Special Revenue Funds—Federal	1,561,500	1,572,200	+10,700
Protection and Advocacy for the MentallyIll			
Special Revenue Funds—Federal	1,101,200	1,189,900	+88,700
Client Assistance			
Special Revenue Funds—Federal	666,900	629,300	-37,600
Protection and Advocacy IR			
Special Revenue Funds—Federal	713,700	371,500	-342,200
Total	$9,725,700	$7,771,900	-$1,953,800

STATE OPERATIONS—GENERAL FUND
SUMMARY OF PERSONAL SERVICE APPROPRIATIONS AND CHANGES
1996-97 RECOMMENDED

Program	Total Personal Service Amount	Total Personal Service Change	Personal Service Regular (Annual Salaried) Amount	Personal Service Regular (Annual Salaried) Change	Holiday/Overtime Pay (Annual Salaried) Amount	Holiday/Overtime Pay (Annual Salaried) Change
Administration	$1,901,000	-$744,100	$1,894,000	-$740,300	$7,000	-$3,800
Total	$1,901,000	-$744,100	$1,894,000	-$740,300	$7,000	-$3,800

STATE OPERATIONS—GENERAL FUND
SUMMARY OF NONPERSONAL SERVICE AND MAINTENANCE UNDISTRIBUTED APPROPRIATIONS AND CHANGES
1996-97 RECOMMENDED

Program	Total Amount	Total Change	Supplies and Materials Amount	Supplies and Materials Change
Administration	$577,000	-$393,200	$24,000	-$14,300
Total	$577,000	-$393,200	$24,000	-$14,300

Program	Travel Amount	Travel Change	Contractual Services Amount	Contractual Services Change
Administration	$131,000	-$21,000	$420,000	-$347,150
Total	$131,000	-$21,000	$420,000	-$347,150

Program	Equipment Amount	Equipment Change
Administration	$2,000	-$10,750
Total	$2,000	-$10,750

STATE OPERATIONS—OTHER THAN GENERAL FUND
SUMMARY OF APPROPRIATIONS AND CHANGES
1996-97 RECOMMENDED

Program	Total Amount	Total Change	Personal Service Amount	Personal Service Change
Administration	$1,531,000	-$536,100	$774,000	-$263,000
Protection and Advocacy for the Developmentally Disabled	1,572,200	+10,700	556,800	+34,500
Protection and Advocacy for the MentallyIll	1,189,900	+88,700	458,000	+25,800
Client Assistance	629,300	-37,600	91,600	+1,200
Protection and Advocacy IR	371,500	-342,200	68,300	+68,300
Total	$5,293,900	-$816,500	$1,948,700	-$133,200

Program	Nonpersonal Service Amount	Nonpersonal Service Change	Maintenance Undistributed Amount	Maintenance Undistributed Change
Administration	$757,000	-$273,100	....	....
Protection and Advocacy for the Developmentally Disabled	166,200	-873,000	$849,200	+$849,200
Protection and Advocacy for the MentallyIll	154,000	-515,000	577,900	+577,900
Client Assistance	69,500	-507,000	468,200	+468,200
Protection and Advocacy IR	25,000	-688,700	278,200	+278,200
Total	$1,171,700	-$2,856,800	$2,173,500	+$2,173,500

AID TO LOCALITIES
ALL FUNDS FINANCIAL REQUIREMENTS BY FUND TYPE
APPROPRIATIONS

Fund Type	Available 1995-96	Recommended 1996-97	Change
General Fund	$80,000	$157,000	+$77,000
Special Revenue Funds—Other	....	86,000	+86,000
Total	$80,000	$243,000	+$163,000

AID TO LOCALITIES
ALL FUNDS FINANCIAL REQUIREMENTS BY PROGRAM
APPROPRIATIONS

Program	Available 1995-96	Recommended 1996-97	Change
Surrogate Decision Making			
General Fund	$80,000	$62,000	-$18,000
Special Revenue Funds—Other	....	86,000	+86,000
Adult Homes			
General Fund	....	95,000	+95,000
Total	$80,000	$243,000	+$163,000

DAVID A. PATERSON
GOVERNOR

STATE OF NEW YORK
COMMISSION ON QUALITY OF CARE & ADVOCACY
FOR PERSONS WITH DISABILITIES
401 STATE STREET
SCHENECTADY, NY 12305-2397
1-800-624-4143 (Voice/TTY/Spanish)
www.cqcapd.state.ny.us

JANE G. LYNCH
CHIEF OPERATING OFFICER

BRUCE BLOWER
PATRICIA OKONIEWSKI
MEMBERS

April 22, 2010

Eliot P. Green
Chair
Board of Trustees
YAI, Inc.
460 West 34th Street
New York, NY 10001-2382

Dear Mr. Green:

The Commission on Quality of Care and Advocacy for Persons with Disabilities has the responsibility pursuant to Article 45 of the New York State Mental Hygiene Law, to review the organization and operations, as well as the cost-effectiveness, of facilities providing services to persons with mental disabilities.

Consistent with this mandate, the Commission responded to an anonymous complaint alleging fiscal mismanagement at Young Adult Institute, Inc. (YAI) and its Network agencies by conducting a limited fiscal review at YAI. As part of this review, the Commission examined selected corporate and financial records at the agency's headquarters between November 2009 and March 2010. Additionally, Dr. Philip Levy and Ms. Karen Wegmann were interviewed to obtain information related to certain aspects of the complaint.

The complaint alleged a variety of problems that were characterized as "unethical and illegal things especially financial fraud." The allegations were wide-ranging. General allegations included items such as billing Medicaid for services not provided, the harassment of staff, and fictitious employees being placed on the payroll. More specific allegations included executive staff being paid from six different corporations; the agency paying the college tuition for children of key employees; the C.E.O. "running his own private therapy company out of the (agency's) main office," and the company doing business with parties related to the executive staff.

Due to the complexities of the complaint, the size of YAI and the limited resources available to the Commission, only certain aspects of the complaint were reviewed. They are summarized below.

1. Corporate Structure and Executive Compensation

Two of the allegations in the complaint involved payments to YAI executives. The complainant alleged that several top executives were being paid from six different companies under the YAI umbrella using different job titles, making it difficult to determine their total compensation. The complainant further alleged that YAI was paying the college tuition for the children of several of these executives.

The Commission conducted a detailed review of payroll records, employment contracts, board minutes and various other records supporting salary and benefit payments for the three-year period ended June 30, 2009. Additionally, the Commission discussed the compensation issue with Marcella Fava, a YAI trustee who was the chairperson of the compensation committee during that time period.

The Commission prepared a detailed analysis of all salary and benefits for the five highest paid employees of YAI during this period (Tables 1-3) and examined tuition payments dating back to 2004 (Table 4).

Regarding the allegation of payments from multiple entities, the Commission found that in addition to their salaries from YAI, four of the top five highest paid employees received payments as consultants from the New York League for Early Learning (NYL) a YAI Network agency, during all or part of the three-year period ending June 30, 2009. These amounts are detailed in Tables 1 through 3. The Commission did not find salary or benefit payments to these employees from any of other YAI Network agencies.

Table 1

	Year Ended June 30,				
	Joe Lev	**Phili Lev**	**Stephe Freema**	**Tom Der**	**Kare Wegman**
Salar	$ 745,265	$ 654,461	$ 326,180	$ 312,683	$ 266,634
Bonu	200,000	173,147	101,500	97,000	46,565
Total Cash	945,265	827,608	427,680	409,683	313,199
Pension & Profit Sharing Plan	**Not Yet Available**				
Employee	17,506	17,447	16,390	14,106	8,036
Expense Account	768	3,900			1,200
Personal Use of	8,080	8,159	6,117	5,520	6,920
Total	26,354	29,506	22,507	19,626	16,156
Compensation Related To Current	971,619	857,114	450,187	429,309	329,355
Non-Qualified Plan	952,427	1,190,258	704,425	605,312	122,034
Total Compensation from	1,924,046	2,047,372	1,154,612	1,034,621	451,389
NY	50,000	50,000	35,000		27,000
Total	$ 1,974,046	$ 2,097,372	$ 1,189,612	$ 1,034,621	$ 478,389

* Amounts were not available as of the time of the Commission's review.
** The one-time cumulative amount of non-qualified plan distribution is an aggregation of the executives' interests

Table 2

	Year Ended June 30,				
	Joe Lev	Phili Lev	Stephe Freema	Tom Der	Kare Wegman
Salar	$ 500,812	$ 454,659	$ 313,635	$ 300,657	$ 251,396
Bonu	186,850	169,276	106,415	102,365	54,630
Total Cash	687,662	623,935	420,050	403,022	306,026
Pension & Profit Sharing Plan	112,073	98,063	132,134	123,896	98,768
Employee	67,946	43,044	14,833	14,062	7,334
Expense Account	768	1,320			1,200
Personal Use of	9,536	9,224	9,936	8,787	8,094
Total	190,323	151,651	156,903	146,745	115,396
Compensation Related To Current	877,985	775,586	576,953	549,767	421,422
Non-Qualified Plan	822,382	666,139	376,088	327,542	382,859
Total Compensation from	1,700,367	1,441,725	953,041	877,309	804,281
NY	48,500	48,500	33,000		25,000
Total Compensation	$ 1,748,867	$ 1,490,225	$ 986,041	$ 877,309	$ 829,281

*The one-time cumulative amount of non-qualified plan distribution is an aggregation

Table 3

	Year Ended June 30, 2007				
	Joel Levy	Philip Levy	Stephen Freeman	Tom Dern	Karen Wegmann
Salary	$ 500,812	$ 454,659	$ 301,228	$ 289,836	$ 233,832
Bonus	176,165	157,406	94,000	88,000	49,000
Total Cash Compensation	676,977	612,065	395,228	377,836	282,832
Pension & Profit Sharing Plan Contrib.	22,945	19,395	73,192	68,555	72,516
Employee Benefits	56,241	40,660	13,090	13,384	6,977
Expense Account	768	2,625			1,200
Personal Use of Auto	8,958	9,638	13,570	12,917	7,462
Total Benefits	88,912	72,318	99,852	94,856	88,155
Total Compensation from YAI	765,889	684,383	495,080	472,692	370,987
NYL	49,200	49,200			
Total Compensation	$ 815,089	$ 733,583	$ 495,080	$ 472,692	$ 370,987

While the allegation of payments from multiple companies is for the most part unsubstantiated, the Commission notes that amounts paid from NYL were in the form of consultant payments. Because the payments were under a required threshold amount, they were not required to be disclosed on the NYL Form 990. However, the Commission believes that the payments from NYL would be more appropriately classified as wages and reported on Form W-2.

With regard to tuition reimbursements, the Commission confirmed that YAI, in previous years, reimbursed three key employees for their children's college tuition. The most recent of these reimbursements were made in the fiscal year ending June 30, 2004. The amounts are detailed in the table below.

Table 4

Tuition	Year June 30,	
Philip	**$**	**76,758**
Joseph	**$**	**30,500**
Stephen	**$**	**25,353**

When interviewed by Commission staff, Dr. Philip Levy was specifically asked if he had received any tuition reimbursements relating to his children's education, to which he answered, "No." It was subsequent to this interview, while reviewing YAI payroll records, that the Commission found the above payments. In a letter dated March 15, 2010, Ms. Fava represented that the board of directors were aware of the payments, that they were made consistent with company policy and properly approved.

2. Private use of agency office space

The Commission found, and Dr. Philip Levy confirmed, that he was using his executive office space at YAI to meet with patients as a counselor in private practice. Dr. Levy stated that approximately three to five hours per week were used for this purpose. The Commission did not find any formal agreement regarding the use of this space nor did it find that Dr. Levy reimbursed the agency for the personal use of this office. According to IRS regulations:

> "an excess benefit transaction is a transaction in which an economic benefit is provided by an applicable tax-exempt organization, directly or indirectly, to or for the use of a disqualified person, and the value of the economic benefit provided by the organization exceeds the value of the consideration received by the organization." (Section 4958 of the Internal Revenue Code)

The Commission has a number of concerns regarding Dr. Levy's use of his YAI office for personal business reasons. First, because there appears to be no formal lease or other agreement, liability and other issues could arise which could prove problematic for YAI. Second, this arrangement could be regarded as an excess benefit transaction, given that YAI received no consideration for the use of this office. The Commission did not explore whether agency staff, equipment and/or supplies were used in connection with Dr. Levy's use of the YAI office for his private practice. The Commission recommends that YAI: 1.) cease allowing Dr. Levy the use of his office space for personal business; 2.) determine the value of the economic benefit for the use of this office and; 3.) seek reimbursement from Dr. Levy for this economic

benefit. In the alternative, a formal agreement for rental of the space and any other use of YAI assets, at fair-market value, could be considered.

3. Vendor relationships

The complaint alleged that there were several vendors who had familial relationships with executives at YAI and received "no-bid" contracts in violation of requirements that contracts supported by funding from NYS be competitively bid.

The Commission performed a cursory review of selected payment documents and found no evidence that any such contracts existed. However, due to the time and resource limits which necessitated the cursory review, the Commission declines to make a definitive determination on this allegation.

The Commission noted that the agency has a Conflict of Interest Policy which requires that familial and other relationships be disclosed through the Conflict of Interest Statement filed on an annual basis by the board and management employees. According to YAI executive staff, the Conflict of Interest disclosure statements are reviewed by the Corporate Compliance Officer and any items of potential conflict are taken to the YAI board. The Commission requests that YAI conduct its own internal investigation and report back to the Commission whether any familial relationships exist with any vendor and, if so, whether the services provided by the vendor were at fair-market and appropriate conflict-of-interest requirements were adhered to.

4. Harassment of staff by executive staff

A review of legal invoices and personnel records did not disclose any evidence to substantiate this complaint. As previously stated, lack of time and resources prevented the Commission from conducting a more detailed examination of employee records to make a definitive determination. However, the board should ensure, if the agency has not already done so, that policies and procedures are in place to allow staff to make complaints without fear of retaliation. The Commission confirmed that the agency has an Open Door Policy, a Whistleblower Policy, and a Non-Retaliation Policy so that individuals may file confidential complaints that are investigated by the Corporate Compliance Officer.

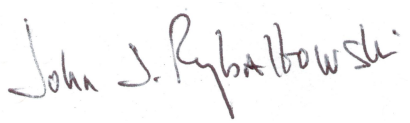
5. Other Findings

Given the current economic climate, there is an increased and justified focus on accountability and transparency in the use of public funds. Although not specifically addressed in the complaint, the Commission also reviewed the travel, entertainment and miscellaneous costs incurred by executive staff and paid for by YAI. For example, YAI paid for domestic hotel stays in amounts well in excess of federal per diem guidelines (in one instance more than $1,000 per night of which $400 was reimbursed by the executive); for meals at lunch and dinner meetings for executive staff who had adjacent private offices at YAI's headquarters; and for items that appeared to be more personal than business in nature, such as tickets to fundraisers or flowers given as gifts. While the aggregate expenses do not appear excessive in comparison to YAI's revenue, and the Commission does not question the legality of these expenditures, the Commission recommends that the board consider carefully whether such expenditures are compatible with the obligation of the board to act as a faithful steward of public funds and assure that those funds are applied for the benefit of the individuals with disabilities served by YAI.

Throughout its review, YAI staff was extremely gracious and cooperative. The Commission would like to especially thank Karen Wegmann and Laura Lyston and their respective staff for their cooperation during its review.

The Commission would appreciate your review of and response to its findings, which response will serve as the board's final position on the matters discussed therein, by May 21, 2010.

Sincerely,



John Rybaltowski
Director
Bureau of Fiscal Investigations

cc. Jill Gentile

Administrative Offices
460 West 34th Street
New York, NY 10001-2382

YAI National Institute for People with Disabilities

Tel (212) 273-6100
Fax (212) 268-1083
www.yai.org

May 10, 2010

Mr. John Rybaltowski, Director
Bureau of Fiscal Investigations
CQCAPD
401 State Street
Schenectady, N.Y. 12305-2397

Dear Mr. Rybaltowski:

This is Young Adult Institute's ("YAI" or the "Agency") response to the letter dated April 22, 2010 from the Commission on Quality of Care and Advocacy for Persons with Disabilities which performed a review of YAI and the Network Agencies in response to an anonymous complaint. The Agency agrees that the anonymous complaint was "far flung" in nature and that upon completion of its investigation, the Commission found the anonymous allegations to be unsubstantiated. We appreciate the professional manner in which the review was conducted.

YAI's reputation for the quality of our services, commitment to our mission and reputation for excellence is unparalleled in the field. Throughout our 53 year history we have been unwavering in our mission of serving individuals with disabilities and their families in the most respectful, dignified and caring manner, responsibly utilizing the Agency's funds to support that mission through a variety of safeguards inclusive of a comprehensive quality assurance and corporate compliance program. It is our goal to continue to provide the highest quality services to our consumers through our dedicated and professional workforce and maintain our excellent reputation and our strong relationship with our consumers and their families. Our reputation, which is widely recognized by government and oversight organizations, families, and the professional community, has been acknowledged with numerous awards and is a testament to the fact that through our services we have provided the individuals we serve with the best possible quality of life. Our reputation has been built over the years through professionalism, ethical behavior, dedication, partnership, and advocacy for our consumers and their families.

With respect to all issues raised, please be assured that the YAI Board of Directors (the "Board") was, at the time, fully informed of these matters and all referenced actions were consistent with the policies approved by the Board. The specific areas covered in the letter from the Commission are addressed below:

1. Corporate Structure and Executive Compensation

In the Commission's report, the issue of reporting of compensation and certain benefits was raised.

With respect to compensation, the allegation that executives were receiving compensation from six different YAI companies was found to be unsubstantiated and this was confirmed in the Commission's letter. All compensation was appropriately reported and fully disclosed to the auditors during their review without any attempt at obfuscation. The Board of YAI oversees the entire compensation process and receives full reporting for executive compensation. All information is properly disclosed on the organization's Form 990. The consultant payments from NYL were properly dealt with in accordance with the instructions of the Form 990. The YAI Board considered these payments in making compensation decisions for the executives and all compensation was properly disclosed as income to the executives.

With respect to the tuition reimbursements, the YAI Board at the time was aware of and approved the tuition benefit as part of a long term retention plan earned over many years to support managing the growth and quality of the organization. The plan, no longer deemed necessary for retention purposes, was discontinued well before this review, with the most recent payment occurring in 2004. This benefit was fully disclosed to the auditors in the compensation workpapers they requested, properly reported on Form 990, and properly included as income by the executives for income tax purposes. In an interview with the Commission's representative, Dr. Levy and Ms. Wegmann both recall that Dr. Levy confirmed that the Agency did provide an education benefit which was known to and approved by the YAI Board. Dr. Levy also confirmed that the benefit was no longer received.

With respect to the compensation information provided in the Commission's letter to the Agency, the YAI Board follows best practices regarding the review and approval of executive compensation which include an independent Executive Compensation Committee that considers the following in determining reasonable executive compensation:

- Written evaluation of the executive's performance annually
- Peer group comparatives and other relevant criteria
- Compensation philosophy
- Use of a compensation study prepared by an independent outside compensation consultant
- Advice of outside legal counsel
- Full review by the Executive Compensation Committee of the Board at least annually and usually more often
- Contemporaneous documentation
- Presentation to and approval by the Board.

As acknowledged in the Commission's letter, the compensation information provided in the Commission's letter includes an amount for a one-time distribution of deferred compensation which was earned over many years of service: 39 years for

the then CEO, 38 years for the then President and COO, and 32 and 29 years for the then Associate Executive Directors, respectively. The amount of deferred compensation reported was for the first time includable in compensation in response to a change in federal regulations and represents nearly 50% of the total reported annual compensation amount. Thus a disproportionate amount was included in one year for reporting purposes. If this amount was viewed annually over the extensive number of years of service over which each executive was employed it would be less than $25,000 per annum on average. In 2008-2009, the YAI board approved a salary increase for the then CEO and the then President and COO effective July 1, 2007, noting that there had not been a base increase for several years despite excellent performance and Agency growth.

2. Private use of agency office space

From the outset, the YAI Board was fully aware of and approved of the minimal use of Dr. Levy's office for before or after hours therapy counseling. The criteria considered by the Board were that the use was *de minimus*, there was no alternative program use, the space was not used during business hours, and the Agency did not incur any cost. Further, the Board acknowledged that use of the space enabled Dr. Levy to remain available on-site for an extended period and supported the use of his clinical skills relevant to the performance of his position. When interviewed by the Commission's representative, Dr. Levy stated that approximately three to five hours per week were used for this purpose and that the YAI Board was aware of and approved of this use. Further, a letter was provided to the Commission by the then YAI Board chair which confirmed this fact. Because the use of space was related to the Agency's business, could have qualified Dr. Levy for a federal tax deduction if he had paid for the space himself and has been substantiated by Dr. Levy, in accordance with Treas. Reg. 1.132-5(a)(2)(i), the use of space qualifies as a non-taxable "working condition fringe benefit". Because a non-taxable fringe benefit that is not excessive when viewed as part of an executive's total compensation package is not an excess benefit transaction under the "intermediate sanctions"rules, the Board does not consider this to be an excess benefit transaction. Nevertheless, the YAI Board will consider the Commission's recommendations.

3. Vendor relationships

The Commission states that it found no evidence to support the allegation, "that there were several vendors who had familial relationships with executives at YAI and received "no-bid" contracts in violation of requirements that contracts supported by funding from NYS be competitively bid". YAI follows best practices with respect to conflicts of interest and bidding. The Agency has a written Conflict of Interest Policy and Bidding Policy. The Agency has a Conflict of Interest policy where relationships are disclosed through the Conflict of Interest Statement filed on an annual basis by members of the Board and management employees. The Conflict of Interest disclosure statements are reviewed by the Corporate Compliance Officer

and any items of potential conflict are taken to the CEO and President and/or the YAI Board. The disclosure statements are consistent with the Commission's findings of no conflicts of interest. The Bidding Policy requires competitive bidding in accordance with OMRDD policies, including soliciting bids from women and minority owned businesses. While we are confident that our procedures have ensured that there are no conflicts of interest, the CFO will conduct an internal investigation as requested by the Commission and report back to the Commission.

4. Harassment of staff by executive staff

The Commission's review showed this allegation to be untrue and confirmed that the Agency follows best practices with respect to possible sexual harassment and other complaints through its open door policy, whistleblower policy, and non-retaliation policy where individuals may file confidential complaints that are investigated by the Corporate Compliance Officer.

5. Other Findings

The YAI Board is cognizant of the economic environment and its fiduciary responsibility regarding its oversight of the appropriate use of government funds for expenses. In my capacity as Chair of the YAI Board, I review and approve all expenses of the CEO and President in accordance with the Agency's written expense reimbursement policy.

Summary

YAI, its Board and its executives consider transparency, accountability and integrity to be the most important aspect of how we approach the delivery of quality services to people with disabilities and their families. We understand that the Commission is required to audit an agency, even when the allegations made are completely unsubstantiated. The Agency appreciates the professionalism and discretion exercised by the auditors during the course of their review.

With the allegations found to be untrue and with no material issues or substantive findings, the Agency considers the matter closed and reaffirms the quality of its reputation.

Sincerely,

Eliot P. Green

Eliot P. Green
Chair, Board of Trustees

Cc: Jill Gentile, Associate Commissioner

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States of America
By: REBECCA C. MARTIN
JEAN-DAVID BARNEA
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, New York 10007
Tel. (212) 637-2714/2679
Fax (212) 637-2750/2717
Email: Rebecca.Martin@usdoj.gov
Jean-David.Barnea@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and STATE OF NEW YORK *ex rel.* RICHARD FADEN, Plaintiffs, v. YOUNG ADULT INSTITUTE, INC. d/b/a NATIONAL INSTITUTE FOR PEOPLE WITH DISABILITIES NETWORK, JOEL M. LEVY, PHILIP H. LEVY, THOMAS DERN, KAREN WEGMANN, and KELLY QUINN, Defendants.	
UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. YOUNG ADULT INSTITUTE, INC. d/b/a NATIONAL INSTITUTE FOR PEOPLE WITH DISABILITIES NETWORK, JOEL M. LEVY, PHILIP H. LEVY, and KAREN WEGMANN, Defendants.	**COMPLAINT-IN-INTERVENTION OF THE UNITED STATES OF AMERICA** 09 Civ. 5003 (RMB)

The United States of America (the "Government"), by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, files this Complaint-In-Intervention against Young Adult Institute, Inc. d/b/a National Institute for People with Disabilities Network ("YAI"), Joel M. Levy, Philip H. Levy, and Karen Wegmann (collectively, "Defendants"), alleging as follows:

1. The Government brings this Complaint-In-Intervention seeking damages and penalties against Defendants under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and, in the alternative, under the common law for payment under mistake of fact and unjust enrichment, because from July 1, 1999 through November 18, 2010, YAI knowingly presented or knowingly caused to be presented false claims to the Government for Medicaid reimbursement.

2. In order to obtain Medicaid funding through the New York Office for People with Developmental Disabilities, formerly the New York Office of Mental Retardation and Developmental Disabilities ("OPWDD"), an organization such as YAI that provides services to developmentally delayed persons (a "provider") must submit annual Consolidated Fiscal Reports ("CFRs"), detailing their costs and their allocations. Further, to the extent that the costs reflected on a provider's CFR exceed the actual reimbursements received from OPWDD throughout the fiscal year, they were entitled to submit "appeals" for additional funding. During the time period in question, YAI misstated and misallocated its costs on its CFRs in such a way as to increase its appeal awards by millions of dollars beyond what it was eligible to receive.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the claims brought under the False Claims Act pursuant to 31 U.S.C. § 3730(a), and 28 U.S.C §§ 1331, 1345, over the remaining claims

pursuant to 28 U.S.C. § 1345, and over all claims pursuant to the Court's general equitable jurisdiction.

4. Venue is appropriate in this District pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. §§ 1391(b) and 1391(c), because YAI is headquartered in this District, does business in this District, and a substantial part of the acts complained of herein took place in this District.

PARTIES

5. Plaintiff is the United States of America, on behalf of its agency the United States Department of Health and Human Services ("HHS").

6. Relator Richard Faden is the former Budget Director for YAI, and resides in New Jersey.

7. Defendant YAI is a New York not-for-profit corporation, which maintains its principal place of business at 460 West 34th Street, New York, NY 10001, and operates, *inter alia*, a network of residential and non-residential facilities and programs for developmentally disabled adults throughout New York City, Long Island, and Westchester County.

8. Defendant Joel M. Levy served as YAI's Chief Executive Officer from prior to 1999 until 2009, when he retired. Upon information and belief, Mr. J. Levy resides in Florida.

9. Defendant Philip H. Levy is YAI's current Chief Executive Officer and previously served as YAI's co-Chief Executive Officer and Chief Operating Officer. Upon information and belief, Mr. P. Levy resides in Manhattan.

10. Defendant Karen Wegmann is YAI's Chief Financial Officer, a position she has held, in either an acting or official capacity, since 2006. Upon information and belief, Ms. Wegmann resides in Manhattan.

FACTS

I. STATUTORY AND ADMINISTRATIVE BACKGROUND

11. Pursuant to the provisions of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, the Medicaid Program was established in 1965 as a joint federal and state program to provide financial assistance to individuals with low incomes to enable them to receive medical care. Under Medicaid, each state establishes its own eligibility standards, benefit packages, payment rates and program administration in accordance with certain federal statutory and regulatory requirements. The state directly pays the health care providers for services rendered to Medicaid recipients, with the state obtaining the federal share of the Medicaid payment from accounts which draw on the United States Treasury. *See* 42 C.F.R. §§ 430.0-.30.

12. The New York State Legislature established New York's Medicaid system in 1966, *see* Act of Apr. 30, 1966, ch. 256, 1966 N.Y. Laws 844, the year after Congress created the federally funded Medicaid program, *see* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 344 (1965). Under this system, Medicaid is administered at the state level by the New York State Department of Health. *See* N.Y. Pub. Health Law § 201(1)(v).

13. The State of New York has promulgated an extensive and complex regulatory scheme governing the administration of the Medicaid program within the State. Part of this regulatory scheme addresses residential facilities for adults with developmental disabilities, such as those at issue in this action, which are administered by the OPWDD, which is part of the New York Department of Mental Hygiene.

14. In particular, there exist three types of residential facilities for developmentally disabled adults that receive Medicaid funding which are at issue in this matter: Community

Residences ("CRs"), Intermediate Care Facilities ("ICFs"), and Individual Residential Alternatives ("IRAs").

15. New York State regulations govern the provision of Medicaid funding to providers operating IRAs, ICFs, and CRs. *See* 14 N.Y. Comp. R. & Regs. § 635-10.5(b) (IRA); *id.* § 681.14 (ICF); *id.* § 686.13 (CR). Each such facility, when opened, is awarded a base rate for reimbursement, based on an initial budget approved by OPWDD. *Id.* § 635-10.5(b)(7)-(8); *id.* § 681.14(c); *id.* § 686.13(b). For IRAs and ICFs, these rates are annually trended forward (*i.e.*, increased by an annual set percentage rate statewide). *Id.* § 635-10.5(i); *id.* § 681.14(h).

16. Providers operating these types of facilities must report their actual costs — which are not necessarily the same as their reimbursement rates — each year to OPWDD in a report called a Consolidated Fiscal Report ("CFR") on a standardized form. *Id.* § 635-4.2(a)(2). The providers are then entitled to submit "appeals" for amounts up to the difference between the approved rate, as trended forward, and their actual costs for operating the facilities, as shown on their CFR. *Id.* § 635-10.5(b)(16); *id.* § 681.14(i); *id.* § 686.13(i).

17. Further, for IRAs and ICFs, the award of certain appeals to a given facility in a given fiscal year (representing costs that are likely to recur) may result in OPWDD adjusting that facility's reimbursement rate for later fiscal years (known as a "roll-forward" payment).

18. OPWDD and other New York agencies that disburse certain government funds, including Medicaid funds, publish each year a "Consolidated Fiscal Reporting and Claiming Manual", *see, e.g.*, N.Y. State, *Consolidated Fiscal Reporting and Claiming Manual for the Period: July 1, 2006 to June 30, 2007* (May 29, 2007), *available at* http://www.oms.nysed.gov/rsu/Manuals_Forms/Manuals/CFRManual/OldYears/06-07_cfr_manual_5-29-07.pdf (the "2006-

07 CFR Manual"), which sets forth instructions for completing the CFR. The manual and corresponding form are revised each fiscal year.

19. Each CFR must be certified by the chief executive officer of the provider submitting it, who must attest that:

> this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge. I further attest to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of the above named [provider].

N.Y. State, *Consolidated Fiscal Report for the Period: July 1, 2006 to June 30, 2007*, at Schedule CFR-i (May 29, 2007), *available at* http://www.oms.nysed.gov/rsu/Manuals_Forms/Forms/CFR/OldYears/200607/CoreForms.pdf. Further, each CFR must be certified by the provider's certified public accountant.

20. In relevant part, the 2006-07 CFR Manual provides that: (1) employees' personal-services expenses must be correctly allocated to the facility or facilities where those employees actually worked, *see* 2006-07 CFR Manual § 16.0, at 16.2; *see also id.* app. J; (2) each employee's personal-services expenses must be matched to a standardized CFR "title code" that "mostly reflects the job function the individual performs," *see id.* § 16.0, at 16.1; *see also id.* app. R, at 51.1, and which are divided, as relevant here, into categories for "direct care" and "clinical care," "program administration," and "agency administration," *see id.* at 51.4-51.10; and (3) fund-raising expenses, including the personal-services expenses for fund-raising employees, are to be listed in a separate column of the CFR designated for non-reimbursable costs, and are not to be categorized as agency administration, *see id.* § 8.0, at 8.10.

21. As detailed below, YAI's CFRs for fiscal years July 1, 1999-June 30, 2000 ("FY1999-2000") through July 1, 2008-June 30, 2009 ("FY2008-09") contained three types of false statements: (1) YAI falsely reported and/or falsely allocated certain employees' personal-services expenses by allocating these expenses to facilities where these employees did not work, or among facilities where these employees did work but not correctly reflecting the proportion of their time where they worked at each facility; (2) YAI falsely reported the personal-services expenses of certain supervisory employees, who were properly classified as "program administration," as falling under "clinical care"; and (3) YAI falsely reported the personal-services expenses of its employees who were involved in fund-raising as "agency administration" instead of in a separate column designated for non-reimbursable costs. As a result of these false statements, YAI was able to submit appeals for facilities that would otherwise not have had appealable costs and/or to increase the amount of appeals it submitted for facilities that would otherwise have had lower appealable costs.

II. YAI'S FALSE CLAIMS

A. YAI Falsely Reported and/or Allocated Certain of Its Employees' Personal-Services Expenses on Its CFRs

22. YAI claimed excessive Medicaid compensation by falsely allocating certain of its employees' personal-services expenses on its FY1999-2000 through FY2008-09 CFRs in a manner that artificially increased YAI's eligibility for appeals funds. Specifically, YAI knowingly submitted false statements to OPWDD that caused Medicaid to pay appeals that were based in part on the falsely allocated personal-services expenses.

23. Upon his or her hiring, each YAI employee was designated in YAI's human-resources and budget records as working within a certain administrative department, at a certain residential or non-residential facility or facilities, or in some other YAI program or programs; for YAI employees who split their time between more than one residential facility (or between a residential facility and some other program), an initial percentage allocation between those facilities was entered in YAI's records. (Certain categories of YAI employees whose work was shared across a large number of facilities were allocated among those facilities as a group, rather than individually.) Whenever there was a change in a YAI employee's duty station or allocation between facilities, YAI practice and CFR record-keeping requirements mandated that such changes be made in writing, and be made in consultation with supervisors familiar with those employees' actual work duties.

24. At the end of each fiscal year in question, YAI's Budget Department generated a series of year-end journal entries to YAI's general ledger that reallocated certain YAI employees' time from one facility to another, or between or among certain facilities, in a manner that did not reflect those employees' correct duty stations or allocations. On information and belief, these changes were not recorded in YAI's human-resources records, nor made in consultation with the relevant employees or their supervisors.

25. Thus, for example, at the end of FY2006-07, YAI retroactively reallocated all of the personal-services expenses for one employee, who worked as a program supervisor for YAI's Manhattan respite program, for that fiscal year among nine IRA facilities in Manhattan and Brooklyn, even though this employee worked at the respite program and did not work at any IRA facilities during that fiscal year. As a further example, at the end of FY2006-07, YAI

retroactively reallocated all of the personal-services expenses for another employee, a registered nurse at one of YAI's Manhattan CR facilities, for that fiscal year among thirty IRA facilities in Manhattan, Brooklyn, Queens, and Westchester, even though that employee worked at the CR facility and did not work at any IRA facilities during that fiscal year.

26. CFR Schedule CFR-4 requires a provider to list, separately for each residential facility, the personal-services expenses for each employee providing services at that facility, aggregated by employee title code. Further, the 2006-07 CFR Manual specifies that: "Employee hours worked, [personal-services] amounts paid and FTEs [full-time employee equivalents] must be allocated if . . . [t]he employee works at more than one (1) program/site [facility] [or] . . . [t]he employee works in more than one position title (job function). Please see Appendix J and/or Appendix L for more information on allocating expenses." 2006-07 CFR Manual § 16.0, at 16.2. Appendices J and L, in turn, specify the acceptable methods for determining how to allocate a shared employee's personal-services expenses.

27. In signing YAI's CFRs for FY1999-2000 through FY2007-08, Defendant J. Levy falsely certified that "this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge." He further falsely "attest[ed] to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of [YAI]." In signing YAI's CFR for FY2008-09, Defendant P. Levy falsely certified that "this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge." He further falsely "attest[ed] to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of [YAI]."

28. As YAI's CFO or acting CFO beginning in FY2006-07, Defendant Wegmann was responsible for the overall accuracy of the CFRs and appeals submitted by YAI, because in her capacity as CFO, she had the responsibility to supervise YAI's Budget Department, which was responsible for preparing the CFRs and appeals.

29. YAI's CFRs for the fiscal years from FY1999-2000 to FY2008-09 falsely allocated certain employees' personal-services expenses on Schedule CFR-4, in violation of the instructions for completing the CFR, the CFR Manual, and contrary to its chief executive officers' certifications.

30. These false allocations of employee personal-services expenses were done in such a way as to increase the potential appeals that could be submitted for the facilities affected.

31. YAI submitted several appeals to OPWDD for each fiscal year at issue, seeking additional funding for its IRAs, ICFs, and CRs. These appeals sought additional Medicaid funding for YAI based on certain differences between the approved facility reimbursement rates, as trended forward, and YAI's expenses as reflected on the falsely certified CFRs.

32. OPWDD granted certain of YAI's appeals during the period between FY1999-2000 and FY2008-09 that it would have denied had YAI correctly allocated the personal-services expenses for its employees on the CFRs. OPWDD awarded more money on certain of YAI's appeals that were granted during the period between FY1999-2000 and FY2008-09 than it would have awarded had YAI correctly allocated the personal-services expenses for its employees on the CFRs. Further, the award of some of these appeals resulted in unwarranted roll-forward payments to YAI.

B. YAI Falsely Categorized the Personal-Services Expenses for Certain "Program Administration" Employees as "Clinical Care" Employees

33. YAI claimed excessive Medicaid compensation by falsely categorizing certain of the personal-services expenses for its employees on its FY1999-2000 through FY2008-09 CFRs as "clinical care" rather than "program administration," which artificially increased YAI's eligibility for appeals funds. Specifically, YAI knowingly submitted false statements to OPWDD that caused Medicaid to pay appeals that were based in part on the falsely categorized personal-services expenses.

34. The 2006-07 CFR Manual requires each employee of a provider to be assigned a "title code" based on that employee's actual job function. Specifically, the manual instructs providers to "select the position title code in Appendix R that mostly reflects the job function the individual performs." 2006-07 CFR Manual § 16.0, at 16.1. Appendix R, in turn, lists position title codes, and categorizes these title codes as falling into one of several categories, including "program administration" and "clinical care."

35. Two of the title codes in "program administration" are "Program or Site Director" and "Assistant Program or Assistant Site Director." A "Program or Site Director" is described as "An individual responsible for the overall direct administration of: 1) a specific program type that operates at more than one site; or 2) multiple program types at a single site; or 3) a specific program type at a single site." *Id.* app. R, at 51.9. An "Assistant Program or Assistant Site Director" is described as an individual who "[a]ssists either the Program Director or the Site Director in the direct administration of a specific program type. . . ." *Id.*

36. One of the title codes in "clinical care" is "Social Worker, Licensed (LMSW [Licensed Master Social Worker], LCSW [Licensed Certified Social Worker])," which is described as "Individuals who are licensed in this discipline by SED [the New York State Department of Education]. LCSW must meet the additional educational experience and examination requirements as mandated." *Id.* at 51.7.

37. During the period between FY1999-2000 and FY2008-09, YAI categorized all of its Residential Directors, Assistant Residential Directors, and Residential Coordinators as "Social Worker, Licensed" for purposes of completing its CFRs. The responsibilities of each of these categories of YAI employees included significant responsibilities with regard to administering and setting policy for YAI's residential facilities.

38. Each YAI Residential Director is responsible for supervising and administering all of YAI's residential facilities in a particular geographic area, of which there are dozens under each director's purview. Assistant Residential Directors and Residential Coordinators are each responsible for supervising and administering at least four residential facilities each.

39. In order to comply with the CFR Manual, YAI's Residential Directors should have been categorized as "Program or Site Director," and YAI's Assistant Residential Directors and Residential Coordinators should have been categorized as "Assistant Program or Assistant Site Director."

40. While some of YAI's Residential Directors, Assistant Residential Directors, and Residential Coordinators during the relevant time period had LMSW or LCSW certifications, most did not.

41. In signing YAI's CFRs for FY1999-2000 through FY2007-08, Defendant J. Levy falsely certified that "this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge." He further falsely "attest[ed] to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of [YAI]." In signing YAI's CFR for FY2008-09, Defendant P. Levy falsely certified that "this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge." He further falsely "attest[ed] to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of [YAI]."

42. As YAI's CFO or acting CFO beginning in FY2006-07, Defendant Wegmann was responsible for the overall accuracy of the CFRs and appeals submitted by YAI, because in her capacity as CFO, she had the responsibility to supervise YAI's Budget Department, which was responsible for preparing the CFRs and appeals.

43. YAI's CFRs for the fiscal years from FY1999-2000 to FY2008-09 falsely categorized the personal-services expenses for certain of its employees on Schedule CFR-4 as "clinical care" rather than "program administration," in violation of the instructions for completing the CFR, the CFR Manual, and contrary to its chief executive officers' certifications.

44. These false allocations of employee personal-services expenses were done in such a way as to increase the potential appeals that could be submitted for the facilities affected.

45. YAI submitted several appeals to OPWDD for each fiscal year at issue, seeking additional funding for its IRAs, ICFs, and CRs. These appeals sought additional Medicaid funding for YAI based on certain differences between the approved facility reimbursement rates,

as trended forward, and YAI's expenses as reflected on the falsely certified CFRs. As relevant here, providers have only a limited ability to appeal cost differences between the reimbursement rates and the CFR expenses for administrative expenses, including program administration, while expenses for clinical care are appealable under a far broader set of circumstances.

46. OPWDD granted certain of YAI's appeals during the period between FY1999-2000 and FY2008-09 that it would have denied had YAI correctly categorized the personal-services expenses for its employees on the CFRs. OPWDD awarded more money on certain of YAI's appeals that were granted during the period between FY1999-2000 and FY2008-09 than it would have awarded had YAI correctly categorized its employees' personal-services expenses on the CFRs. Further, the award of some of these appeals resulted in unwarranted roll-forward payments to YAI.

C. YAI Falsely Categorized the Personal-Services Expenses for Its Fund-Raising Staff as "Agency Administration"

47. YAI claimed excessive Medicaid compensation by falsely categorizing the personal-services expenses of its fund-raising staff on its FY1999-2000 through FY2008-09 CFRs as "agency administration" rather than in the separate column designated for non-reimbursable expenses, which artificially increased YAI's eligibility for appeals funds. Specifically, YAI knowingly submitted false statements to OPWDD that caused Medicaid to pay appeals that were based in part on the falsely categorized personal-services expenses of YAI's fund-raising staff.

48. The 2006-07 CFR Manual specifies several times that "expenses related to fundraising are reported on Schedule CFR-2 in column 7, 'Other Programs'. Expenses related to

fundraising must not be reported as an agency administration expense on Schedule CFR-3 . . . ." 2006-07 CFR Manual § 8.0, at 8.10; *accord id.* § 9.0, at 9.3; *id.* § 14.0, at 14.1; *id.* § 15.0, at 15.1; *id.* app. I, § 42.0, at 42.1. Fund-raising expenses include the expenses for throwing special events. *See id.* § 9.0, at 9.3.

49. YAI has several employees within its Development Department who spend all or part of their time conducting fund-raising, and planning fund-raising special events, including an annual walk in Central Park and an awards dinner.

50. During the period between FY1999-2000 and FY2008-09, YAI included the personal-services expenses for all of its employees who engage in fund-raising or in planning fund-raising special events as "agency administration" on its Schedule CFR-3, rather than listing them under "Other Programs" in Schedule CFR-2, column 7, where they should have been listed.

51. In signing YAI's CFRs for FY1999-2000 through FY2007-08, Defendant J. Levy falsely certified that "this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge." He further falsely "attest[ed] to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of [YAI]." In signing YAI's CFR for FY2008-09, Defendant P. Levy falsely certified that "this report has been completed in its entirety, and is in accordance with the instructions and is true and correct to the best of my knowledge." He further falsely "attest[ed] to the fact that there are records and allocation worksheets to support all the information contained herein, in the custody of [YAI]."

52. As YAI's CFO or acting CFO beginning in FY2006-07, Defendant Wegmann was responsible for the overall accuracy of the CFRs and appeals submitted by YAI, because in her

capacity as CFO, she had the responsibility to supervise YAI's Budget Department, which was responsible for preparing the CFRs and appeals.

53. YAI's CFRs for the fiscal years from FY1999-2000 to FY2008-09 falsely categorized the personal-services expenses for certain of its employees on Schedule CFR-3 as "agency administration," rather than as falling under expenses for "Other Programs" on Schedule CFR-2, column 7, in violation of the instructions for completing the CFR, the CFR Manual, and contrary to its chief executive officers' certifications.

54. These false allocations of employee personal-services expenses were done in such a way as to increase the potential appeals that could be submitted for the facilities affected.

55. YAI submitted several appeals to OPWDD for each fiscal year at issue, seeking additional funding for its IRAs, ICFs, and CRs. These appeals sought additional Medicaid funding for YAI based on certain differences between the approved facility reimbursement rates, as trended forward, and YAI's expenses as reflected on the falsely certified CFRs. As relevant here, expenses for "Other Programs" are not appealable.

56. OPWDD granted certain of YAI's appeals during the period between FY1999-2000 and FY2008-09 that it would have denied had YAI correctly categorized the personal-services expenses for its fund-raising employees on the CFRs as falling under "Other Programs." OPWDD awarded more money on certain of YAI's appeals that were granted during the period between FY1999-2000 and FY2008-09 than it would have awarded had YAI correctly categorized the personal-services expenses for its fund-raising employees on the CFRs as falling under "Other Programs." Further, the award of some of these appeals resulted in unwarranted roll-forward payments to YAI.

FIRST CLAIM
Violations of the False Claims Act
(31 U.S.C. § 3729 (a)(1))
Presenting False Claims for Payment
(All Defendants)

57. The Government incorporates by reference paragraphs 1 through 56 above as if fully set forth herein.

58. The Government seeks relief against the Defendants under Section 3729(a)(1) of the False Claims Act, 31 U.S.C. § 3729(a)(1).

59. As set forth above, Defendants knowingly or acting with deliberate ignorance or with reckless disregard for the truth, presented, or caused to be presented, to an officer, employee or agent of the Government, false and fraudulent claims for payment or approval in connection with the submission of YAI's CFRs and appeals to OPWDD for reimbursement under the Medicaid program.

60. The Government paid YAI under the Medicaid program because of Defendants' fraudulent conduct.

61. By reason of YAI's false claims, the Government has been damaged in a substantial amount to be determined at trial, and a civil penalty as required by law for each violation.

SECOND CLAIM
Violations of the False Claims Act
(31 U.S.C. § 3729 (a)(1)(B) (Supp. 2009))
Use of False Statements
(All Defendants)

62. The Government incorporates by reference paragraphs 1 through 61 above as if fully set forth herein.

63. The United States seeks relief against Defendants under Section 3729(a)(1)(B) of the False Claims Act, 31 U.S.C. § 3729(a)(1)(B) (Supp. 2009).

64. As set forth above, Defendants knowingly or acting in deliberate ignorance or in reckless disregard of the truth, made, used, and caused to be made and used, false records and statements material to a false or fraudulent claim in connection with the submission of YAI's CFRs and appeals to OPWDD for reimbursement under the Medicaid program.

65. The Government paid such false or fraudulent claims because of the acts and conduct of Defendants.

66. By reason of Defendants' false claims, the United States has been damaged in a substantial amount to be determined at trial, and a civil penalty as required by law for each violation.

THIRD CLAIM
Payment Under Mistake of Fact
(All Defendants)

67. The Government incorporates by reference paragraphs 1 through 66 above as if fully set forth herein.

68. The Government seeks relief against Defendants to recover monies paid under mistake of fact.

69. The Government paid YAI based on the CFRs and appeals submitted by YAI under the erroneous belief that YAI was entitled to payment of such funds. In making such payments the Government relied upon and assumed the truth of the representations by YAI and Defendants J. Levy and P. Levy that YAI had complied with the applicable Medicaid rules and regulations and that YAI's claims for Medicaid reimbursement were true. This erroneous belief

was material to the Government's decision to pay YAI. In such circumstances, the Government's payment of federal funds to YAI under the Medicaid program was by mistake and was not authorized.

70. Because of these payments by mistake, YAI has received monies to which it is not entitled.

71. By reason of foregoing, the Government was damaged in a substantial amount to be determined at trial.

FOURTH CLAIM
Unjust Enrichment
(All Defendants)

72. The Government incorporates by reference paragraphs 1 through 71 above as if fully set forth herein.

73. By reason of the payments made by the Government to YAI, based on the CFRs and appeals YAI submitted under the Medicaid program, YAI was unjustly enriched. The circumstances of YAI's receipt of these payments are such that, in equity and good conscience, YAI should not retain these payments, the amount of which is to be determined at trial.

* * *

WHEREFORE, plaintiff, the Government, respectfully requests that judgment be entered in its favor and against Defendants as follows:

a. On the First and Second Claims for relief (Violations of the False Claims Act, 31 U.S.C. § 3729(a)(1) and 31 U.S.C. § 3729(a)(1)(B) (Supp. 2009)), against all Defendants, for treble the Government's damages, in an amount

to be determined at trial, and such civil penalties as are required by law, together with all such further relief as may be just and proper;

b. On the First and Second Claims for Relief, against all Defendants, an award of costs pursuant to 31 U.S.C. § 3729(a);

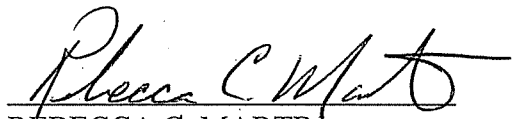
c. On the Third Claim for Relief (Payment Under Mistake of Fact), against all Defendants, in an amount to be determined at trial, together with costs and interest;

d. On the Fourth Claim for Relief (Unjust Enrichment), against all Defendants, in an amount to be determined at trial, together with costs and interest; and

e. awarding such further relief as is proper.

Dated: New York, New York
January 18, 2011

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States

By: 

REBECCA C. MARTIN
JEAN-DAVID BARNEA
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, N.Y. 10007
Tel. (212) 637-2714/2679
Fax (212) 637-2750/2717
Email: Rebecca.Martin@usdoj.gov
Jean-David.Barnea@usdoj.gov

NYS Office For People With Developmental Disabilities
Putting People First

Andrew M. Cuomo, *Governor*
Courtney Burke, *Commissioner*

Executive Office

44 Holland Avenue
Albany, NY 12229-0001

TEL: 518-473-1997
FAX: 518-473-1271
TTY: 866-933-4889

www.opwdd.ny.gov

July 6, 2011

Mr. Jeffrey R. Ruggiero
Arnold & Porter LLP
399 Park Avenue
New York NY 10022-4690

Dear Mr. Ruggiero:

We are in receipt of your June 15, 2011 letter, the accompanying Cash Flow Projections and the June 27, 2011 submission of financial statements for the Fiscal Year ended June 30, 2010 on behalf of your client, Young Adult Institute, Inc. (YAI). We appreciate your efforts in this regard and your prompt submission of the plan as requested by us.

We have reviewed your plan and the accompanying financial statements. Based on our internal review and discussions, we have several concerns and questions and will, therefore, require additional material from you/your client to adequately evaluate the plan before arriving at a decision. Specifically:

*Under "Section A. Administrative Efficiencies", you indicated that "In addition, YAI has implemented a salary freeze for executive management and most senior managers." Frankly, we were surprised and disappointed at this level of action. Given YAI's repayment obligation, which is in excess of $18 million, our expectation was that compensation for executive staff would be reduced not simply frozen.

*Under "Section A. Administrative Efficiencies", you have stated that beginning in Fiscal Year 2011-1012, you anticipate saving $2.3 million pursuant to various administrative actions you have taken. However, your "Projections for the years ending June 30, 2011 through 2016" reflects a salary reduction savings of approximately $5.0 million from 2011 to 2012. There is no other mention of any salary cost reduction measures anywhere in the report. Please provide details as to what other salary cost reduction measures are expected to be effectuated to arrive at the $5.0 million savings commencing with the year ended June 30, 2012 and continuing through the year ended June 30, 2016. Also, please indicate your plans during this time period as it relates to the direct support workforce.

*Under "Section B. Sources of Additional Revenue-Fundraising", you indicated that although your net receipts from fundraising activities in 2010 was $2.1 million, in future years, you expect to receive $2.4 million per year, for an increase of about $300 thousand per year. Please provide a clearer and more detailed explanation of all your proposed fundraising activities, which would net about $2.4 million per year, in each of the identified years.

*In the accompanying schedule "Projections for the years ending June 30, 2011 through 2016", the very first line shows a balance of $ 8,779,140 as "Beginning Operating Cash and Money Market Balance". This does take into account YAI's beginning payables as of July 1, 2010. Ideally, this line should reflect the net current assets (working capital) as of July 1, 2010.

Our review of YAI's certified financial statements for the year ended June 30, 2010, shows current assets of $55,301,492 and current liabilities of about $54,818,370, leaving a net working capital balance of only $483,122. We recognize that during the year commencing on July 1, 1010, YAI may have liquidated some of its fixed assets thereby increasing its cash liquidity. Please provide support to verify the most recent trial balance and provide documents supporting the increased balance in the appropriate asset accounts.

*In your calculation of the "Beginning Operating Cash and Money Market Balance at July 1", you have included, as stated in the notes, YAI's available $16 million credit line. Although a credit line is available to meet unforeseen needs of an agency, normally it is not included in the available resources for the purpose of cash flow projections. The rationale is that paying off one debt, the Medicaid disallowance in this case, using another debt, such as a line of credit, only prolongs the period of the indebtedness of the agency and does not reflect the agency's ability to pay off the debt in totality. In fact, due to higher interest rates on the line of credit, it could adversely affect the future cash flow projections. Therefore, please revise your projections to exclude any use of YAI's credit line.

*In the cash flow projection, we noted that "government payments" were identified in the amount of $18,773,184. Our calculations are that this amount should be $18,994,000.

*In the notes to the cash flow projections, you have stated that the projections do not include any operating activity of YAI's Certified Home Health Agency or any potential future rate reimbursement changes. However, there is no detail as to how YAI intends to fund its activities relating to the Certified Home Health Agency or what plans are in place, if any, to cease operations of that subdivision. Please provide us with details regarding the projected operation of the Certified Home Health Agency.

*The cash flow projections include assumptions regarding July 1, 2011 efficiency adjustments. Please provide a summary of the assumptions that were utilized regarding the efficiency adjustments to prepare the cash flow projections.

The revisions identified in this correspondence along with the supplemental information requested should be submitted to my attention no later than July 18, 2011. Evidence should be provided that the revised projections and supplemental information has been discussed by YAI's Board of Directors. Upon receipt of the requested information, my office will be communicating with you to arrange for a meeting with YAI's Board of Directors regarding its comprehensive plan of action and related issues.

In the meantime, if you have any questions regarding this letter, please address them through Kerry Delaney, our General Counsel, at 518-474-7700.

Thank you for your efforts in this regard.

Sincerely,

James F. Moran
Acting Executive Deputy Commissioner

cc: Commissioner Burke
Eliot R. Green
Philip H. Levy
Kerry Delaney
Jay Kiyonaga
Jill Gentile
Mohan Iyer
Joanne Howard